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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 649

MISHAWAKA RUBBER AND WOOLEN MANUFACTURING COMPANY, PETITIONER,

vs.

S. S. KRESGE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1941.

CERTIORARI GRANTED NOVEMBER 10, 1941.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

In Equity No. 6673

MISHAWAKA RUBBER AND WOOLEN MANUFACTURING COMPANY, *Plaintiff*,

v.

S. S. KRESGE COMPANY, *Defendant*

BILL OF COMPLAINT—Filed November 28, 1934

To the Judges of the District Court of the United States for the Eastern District of Michigan:

The plaintiff, Mishawaka Rubber and Woolen Manufacturing Company, complaining of the herein named defendant, alleges:

I

That plaintiff, herein is a corporation duly organized and existing under the laws of the State of Indiana, having its principal place of business at Mishawaka, County of St. Joseph in said State, and is a citizen, resident and inhabitant of said State; that the name of said corporation was Mishawaka Woolen Manufacturing Company from the time of its incorporation until September 10, 1923, at which time its name was duly changed from Mishawaka Woolen Manufacturing Company to its present name, Mishawaka Rubber and Woolen Manufacturing Company.

II

That the defendant, S. S. Kresge Company is a corporation duly organized and existing under the laws of the State of Michigan, having its principal place of business at Detroit, County of Wayne and State of Michigan, and is a [fol. 2] citizen, resident and inhabitant of said State.

III

That this is a suit in equity arising under the trade mark laws of the United States and for infringement of a

trade mark registered in the United States Patent Office, and for unfair competition, and the parties hereto are citizens of different States and the matter in controversy herein, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars.

IV

That plaintiff is the owner of a trade mark comprising a round or circular figure of a red color, which it adopted and began to use more than 43 years ago on and in connection with footwear and other products and has used continuously since then on substantially all of its goods in trade within the State of Indiana and in interstate trade with all of the States of the United States and in trade with many foreign countries, said trade mark having been applied in various ways on said goods, and said goods having increased greatly in quantity and variety during that time and consisted principally of footwear of various kinds including boots and shoes of rubber and of leather, said trade mark and ownership thereof by plaintiff having been upheld by the United States Circuit Court, Northern District of New York on July 2, 1896 in an action by this plaintiff, then Mishawaka Woolen Manufacturing Company against Edward R. Rice, Equity No. 6352, and by the United States District Court, Southern District of Ohio, Eastern Division on November 16, 1915 in an action by this plaintiff, then Mishawaka Woolen Manufacturing Company against George Schlaegel and Conrad Schlaegel, Co-partners, doing business as Schlaegel Bros., Equity No. 22.

V.

That plaintiff, on or about April 9, 1898, having used its aforesaid trade mark on and in connection with woolen boots, lumbermen's socks, rubber boots and shoes, combination boots formed of rubber and wool, robes, blankets, and clothing, and being the true and lawful owner of said trade mark and entitled to registration thereof, made due and proper application, in its then proper name, Mishawaka [fol. 3] Woolen Manufacturing Company, to the United States Patent Office for registration of said trade mark, and after due and proper proceedings and payment of the required fee, certificate of registration No. 36,471 was duly

granted on May 28, 1901 to plaintiff, then Mishawaka Woolen Manufacturing Company for said trade mark as applied to said goods, and on May 28, 1931 under its then proper name, Mishawaka Rubber and Woolen Manufacturing Company, plaintiff, duly and properly renewed said registration which is now in full force and effect and owned by plaintiff, which said certificate of registration, or a duly certified copy thereof, will be produced as this Court may order and direct.

VI

That plaintiff, for more than 35 years has been making rubber heels for use on its boots and shoes and applying its said trade mark directly on said rubber heels, its said trade mark in many cases also appearing elsewhere on the boots and shoes or on the packages containing same, and by reason thereof said rubber heels, as well as the boots and shoes on which they were used, have been and are identified as and known to be the product of this plaintiff, and plaintiff has the exclusive right to use such mark on rubber heels.

VII

That plaintiff, throughout the time that it has been using its said trade mark on rubber heels as aforesaid, has applied said mark thereon approximately at the center of the bottom or tread face thereof, said rubber heels having been originally and for a number of years thereafter provided at said location with a circular depression in which a red circular disk was inserted and secured and said rubber heels after that time and for the past 25 years or more having been provided with a circular, or substantially circular plug of red rubber embedded in the rubber of the heel at said location so that the mark would remain and serve to identify and indicate the origin of the goods throughout and notwithstanding the wearing down of the heel in actual use, which said arrangement of a distinct, conspicuous spot or small patch of a bright or contrasting color on the tread face of said rubber heels and of a permanent nature, was unique and original at the time it was first employed by [fol. 4] plaintiff and has been and is widely known and regarded as and is a peculiar, distinctive and characteristic feature or ensemble by which plaintiff's rubber heels and the boots and shoes on which such heels are used may be and

are recognized and identified as the goods of this plaintiff and plaintiff has the exclusive right to use such ensemble.

VIII

That plaintiff, from the start of its business and throughout all the time that it has been using its said trade mark and the said unique ensemble of a distinct, conspicuous spot or patch of a bright or contrasting color on the tread face of its rubber heels, has devoted much care, time and expense in manufacturing and improving its goods so as to insure the highest standard of quality and has thereby earned for its products an enviable and unexcelled reputation throughout the United States and elsewhere, and it has also spent large sums of money,—more than $3,000,000 since 1909 and a large sum before then,—in advertising its goods throughout the United States and in familiarizing the purchasing public with its goods and the merits thereof and with its trade mark and also the aforesaid ensemble, and it has also conducted its business in a manner to create and establish a great and widespread good will, by reason of all of which plaintiff has developed a very large and increasing business of great value and profit which increased from 1891 to about $20,000,000 in 1920 and has averaged about $20,000,000 annually since then with more than 50,000 dealers throughout the United States handling its goods, and plaintiff and its goods have become and are widely and favorably known throughout the United States and its said trade mark and the aforesaid ensemble under and by which its goods have thus become and are known and by which its goods have been and are identified and distinguished from similar goods of other origin or manufacture have likewise become and are widely and favorably known throughout the United States and are of great value to plaintiff.

IX

That defendant, S. S. Kresge Company, well knowing the premises and the rights of plaintiff herein, and without the permission of plaintiff and in defiance and infringement of plaintiff's rights in the premises, and for the purpose of appropriating to itself the benefits and advantages of plain-
[fol. 5] tiff's prolonged and extensive advertising and the long and widespread popularity of plaintiff's goods and

the reputation thereof for high quality and excellence and with the intention of deceiving and misleading the public and purchasers into believing that rubber heels that it sold are genuine products of high quality produced by plaintiff, has been and is now displaying, offering for sale and selling in the State of Michigan and throughout the United States, large numbers of spurious rubber heels which are marked with a red mark simulating and infringing plaintiff's aforesaid trade mark, and has been and is now at the same places aforesaid displaying, offering for sale and selling other spurious rubber heels having thereon marks in pale shades of or tinged with red or otherwise colored which simulate and infringe plaintiff's aforesaid trade mark, and has been and is now at the same places aforesaid displaying, offering for sale and selling spurious rubber heels which simulate and imitate plaintiff's aforesaid unique and peculiar ensemble and which are designed and intended to be and are mistaken for, regarded and purchased as and for plaintiff's rubber heels and which, like the rubber heels of plaintiff, have a distinct, conspicuous spot or patch of a bright or contrasting color on or in the trade face thereof, which said spot or patch on defendant's spurious rubber heels is of substantially the same size as and located in approximately the same place and applied in substantially the same manner on or in the tread face of said spurious rubber heels as is plaintiff's trade mark on its rubber heels, and defendant has been and is now at the same places aforesaid displaying, offering for sale and selling its various said spurious rubber heels at and from the same counters and at and from the same sections or compartments of said counters and has been and is now mixing together and associating said various spurious rubber heels at said counters, sections and compartments, and said various spurious rubber heels of defendant are made and marked in such a manner and are mixed together, associated and arranged in the display, offering for sale and selling thereof so that all of defendant's aforesaid spurious rubber heels appear to be and are regarded and purchased as goods or varieties of goods of the same origin, each and all of which aforesaid acts of defendant have a tendency to and do greatly impair the distinctiveness and value of plaintiff's trade mark or ensemble or both and have a tendency to and [fol. 6] do destroy largely the beneficial effect of plaintiff's

extensive and expensive advertising and have caused great and irreparable damage to plaintiff.

X

Plaintiff further says that the aforesaid spurious heels are distributed and sold by the defendant in what are commonly known as chain stores in which, as plaintiff understands and believes, goods of inferior or defective quality are generally sold, and that moreover the heels thus sold by defendant are sold by it principally, if not entirely, for the repair of shoes, usually of a cheap and inferior kind, that have become old and worn, and that not only are the spurious heels thus sold by defendant regarded by most of those familiar with plaintiff's trade mark as the product of the plaintiff, but also the old, worn, cheap, shoddy and inferior shoes to which such heels are attached, all to the further great and irreparable damage to the plaintiff.

XI

Plaintiff further says, on information and belief, that defendant has conspired with, encouraged, persuaded and caused Essex Rubber Company of Trenton, New Jersey, and Sure Foot Heel and Rubber Company of Gettysburg, Pennsylvania, and perhaps others, to disregard plaintiff's aforesaid rights and to make up and sell rubber heels in violation thereof and that these and the other unlawful acts of defendant complained of herein, have a tendency to and do encourage and cause others to disregard and violate plaintiff's said rights, all to the further great and irreparable damage to the plaintiff.

XII

Plaintiff further says that said defendant threatens to and will continue the aforesaid unlawful acts unless restrained therefrom by this Court, and that such continuation of said unlawful acts will and does have the effect of materially destroying and impairing the effects of the extensive advertising done and being done by the plaintiff, and the value to plaintiff of its aforesaid trade mark and other indicia by which its products are distinguished and identified.

[fol. 7] XIII

Plaintiff further says that said defendant has had due and proper notice of the issuance of said trade mark registration certificate to plaintiff and the renewal thereof, and of plaintiff's rights in the premises and of the defendant's infringements of said trade mark and aforesaid acts of unfair competition, but, nevertheless, has continued and is now continuing such infringing acts and unfair competition in defiance of such notice and of plaintiff's rights in the premises.

XIV

On information and belief, the plaintiff further says that defendant has made large gains and profits by reason of said unlawful acts, but the precise amount of said profits is unknown to plaintiff and plaintiff prays that said defendant will be compelled to disclose same.

XV

Plaintiff further shows that it has no adequate remedy at law.

Wherefore, the plaintiff prays that the said defendant, the said S. S. Kresge Company, may be decreed to account for and pay to plaintiff the profits or income thus unlawfully derived from the violation of plaintiff's rights, and in addition thereto, the damages sustained by plaintiff by reason of the defendant's said unlawful acts; that under the circumstances presented the said damages thus found be trebled by the order of this Court; that the defendant may be decreed to pay the costs of this suit; that a permanent, and also a preliminary writ of injunction may be issued out of and under the seal of this Honorable Court, directed to said defendant, S. S. Kresge Company, strictly enjoining it, its officers, associates, attorneys, solicitors, agents, clerks, servants and workmen, and each of them, from directly or indirectly using the said red mark in connection with the manufacture or sale of heels for boots or shoes, or any imitation or simulation thereof, or any mark, designation, arrangement, ensemble or dress that is likely to deceive or confuse purchasers or users, or in any way mislead the purchasing public into the purchase of defendant's products in the belief that they are purchasing those

of the plaintiff, and further that said defendant may be required to deliver up to be destroyed all boot and shoe heels bearing the said red mark or designation, or any color-
[fol. 8] able imitation or simulation thereof or any ensemble similar to that of plaintiff; and that plaintiff may have such other and further relief as the nature of the case may require.

Plaintiff further prays this Honorable Court to issue its writ of subpoena in due form of law and according to the course and practice of the Court, directed to said S. S. Kresge Company, the defendant as aforesaid, commanding it at a day certain and under a certain penalty to be therein specified, to appear before this Honorable Court to answer all and singular the matters and things hereinbefore set forth and complained of, but not under oath, answer under oath being hereby expressly waived, and to stand by and abide and perform all the orders and decrees of the Court herein.

Mishawaka Rubber and Woolen Manufacturing Company, by (S.) E. J. W. Fink, Its President.

(S.) Thos. S. Donnelly, Solicitor for Plaintiff, 3437-3441 Book Tower, Detroit, Michigan. (S.) Eugene M. Giles, Counsel.

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* * * * * * *

[fol. 9] IN UNITED STATES DISTRICT COURT

ANSWER—Filed January 12, 1935

Defendant, saving and reserving unto itself all right of exception to the plaintiff's bill of complaint on account of the many errors therein contained, for answer thereto, or to so much and to such parts thereof as they are advised it is necessary to make answer, answering, says:

I

Answering paragraph I, it has no knowledge or information, other than from the bill of complaint, as to the allega-
[fol. 10] tions therein contained and cannot admit or deny the allegations thereof, but leaves the plaintiff to its proofs.

II

Answering paragraph II, it admits the allegations therein contained.

III

Answering paragraph III, it admits that this is a suit in equity, arising under the trade-mark laws of the United States and for infringement of a trade-mark registered in the United States Patent Office, and for unfair competition. As to the remaining allegations, it has no knowledge or information, other than from said bill of complaint.

IV

Answering paragraph IV, it has no knowledge or information of the allegations therein contained, other than from the plaintiff's bill of complaint, and therefore can neither admit nor deny the allegations thereof, but leaves the plaintiff to its proofs.

V

Answering paragraph V, it has no knowledge or information of the allegations therein contained, other than from the plaintiff's bill of complaint, and therefore can neither admit nor deny the allegations thereof, but leaves the plaintiff to its proofs.

VI

Answering paragraph VI, it has no knowledge or information of the allegations therein contained, other than from the plaintiff's bill of complaint, and therefore can neither admit nor deny the allegations thereof, but leaves the plaintiff to its proofs.

VII

Answering paragraph VII, it has no knowledge or information of the allegations therein contained, other than from the plaintiff's bill of complaint, and therefore can neither admit nor deny the allegations thereof, but leaves the plaintiff to its proofs.

[fol. 11]

VIII

Answering paragraph VIII, it has no knowledge or information of the allegations therein contained, other than from the plaintiff's bill of complaint, and therefore can neither

admit nor deny the allegations thereof, but leaves the plaintiff to its proofs.

IX

Answering paragraph IX, it denies that it now is or ever has displayed or offered for sale spurious rubber heels, simulating or intending to simulate plaintiff's product. It admits that it has in the past displayed and offered for sale the rubber heels of the O'Sullivan Rubber Company, Inc., of New York City, and of the Essex Rubber Company, of Trenton, New Jersey, the quality of whose products are equal to, and in many cases, superior to those of the plaintiff; that in some of the heels there has been displayed a red Indian head and in others a red Crusader's head, neither of which simulated or was intended to simulate the red ball of plaintiff with the words "ball band" adjacent thereto. It denies any intention to appropriate to itself any benefits of plaintiff's advertising, and it denies that any benefits accrued. It denies any intention to deceive and mislead the public, but on the contrary, asserts that its success and reputation with the public is predicated upon selling superior goods at a fair price. Answering the remaining allegations, not hereinbefore specifically covered, it denies the same.

X

Answering paragraph X, it admits that it sells rubber heels of high quality. It denies that it sells spurious heels. As to the remaining allegations thereof, it denies the same and says further that they are impertinent, libelous and intended to be libelous and here and now moves the Court to have the same stricken from the bill of complaint and expunged from the record, and gives notice of the hearing on argument of the same on the date of trial hereof.

XI

Answering paragraph XI, it denies the allegations therein contained.

XII

Answering paragraph XII, it denies that it has acted unlawfully and denies that any of its acts have destroyed [fols. 12-17] or impaired the benefit of any advertising plaintiff may have done, or that it has been injured in any manner whatsoever.

XIII

Answering paragraph XIII, it admits correspondence has passed between plaintiff and itself. It denies that it is infringing or ever has infringed upon plaintiff's rights and denies that it has unfairly competed with plaintiff or plaintiff's rights in the premises. As to the remaining allegations thereof, it denies the same.

XIV

Answering paragraph XIV, it denies that it has acted unlawfully; it denies having made large gains and profits, and alleges the fact to be that at this very moment it is determining what profit, if any, it has made on the sale of rubber heels.

XV

Answering the bill of complaint generally, it denies each and every allegation therein contained not hereinbefore specifically answered and that there is any other matter in said bill of complaint material or necessary for this defendant to make answer thereto, and not herein and hereby well and sufficiently answered to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and it humbly prays to be hence dismissed, with reasonable costs and charges in its behalf most wrongfully sustained.

(S.) Lawson & Giles, Attorneys for Defendant, 2433 Barlum Tower, Detroit, Michigan, Ra. 1771.

Dated: Detroit, Michigan, January 7, 1935.

* * * * * * *

[fol. 18] In United States District Court

Interrogatories to Defendant Under Equity Rule 58—Filed February 1, 1935

Now comes Mishawaka Rubber and Woolen Manufacturing Company, plaintiff, by its solicitor, and pursuant to

Equity Rule 58 submits the following interrogatories to S. S. Kresge Company, defendant:

1. State whether or not Defendant has since May 28, 1901 and prior to the commencement of this suit offered for sale and sold rubber heels which are duplicates of the rubber heels, or any of them, filed herewith and marked as follows:

Defendant's heel No. 1.
Defendant's heel No. 2.
Defendant's heel No. 3.
Defendant's heel No. 4.
Defendant's heel No. 5.
Defendant's heel No. 6.
Defendant's heel No. 7.
Defendant's heel No. 8.
Defendant's heel No. 9.

2. If the answer to Interrogatory No. 1 is in the affirmative, give the name and location, including street address, city and state, of any and all stores or places of business where Defendant has offered for sale and sold said rubber heels and state which of such heels have been offered for sale and sold at each store or place of business.

3. State whether or not Defendant has stores or places of business at the following locations or any of them, and supply the street address, if any, of any such store or place for which the street address is not given in the following list:

Chicago, Illinois
10-14 S. State Street
24-28 S. State Street
225-227 S. State Street
Bloomington, Indiana
Indianapolis, Indiana
17-23 W. Washington Street
New Albany, Indiana
302-304 Pearl Street
[fol. 19] Richmond, Indiana
South Bend, Indiana
201 S. Michigan Street
Dubuque, Iowa
798 Main Street

Detroit, Michigan
1201 Woodward Avenue
1459 Woodward Avenue
Kalamazoo, Michigan
133-37 So. Burdik Street
Minneapolis, Minnesota
7th & Nicollet
St. Paul, Minnesota
59 E. 7th Street
St. Louis, Missouri
7th & Washington Sts.
Lincoln, Nebraska
1125 O Street
Orange, New Jersey
245 Main Street
Buffalo, New York
472 Main Street
Schenectady, New York
433-36-39 State Street
Cleveland, Ohio
402 Euclid Avenue
Columbus, Ohio
85 No. High
85 So. High
Springfield, Ohio
25-27 Main Street
Chester, Pennsylvania
526 Market Street
Pittsburgh, Pennsylvania
324—5th Avenue
Wilkes-Barre, Pennsylvania
3-5 S. Main Street
Lynchburg, Virginia
1008 Main Street
Clarksburg, West Virginia
324 W. Main Street
Milwaukee, Wisconsin
1423 N. 12th Street.

4. If the answer to Interrogatory No. 1 is in the affirmative, state where and by whom each of said rubber heels were manufactured or produced.

[fol. 20] 5. State whether or not Defendant has, since May 28, 1901 and prior to the commencement of this suit, shipped

or caused to be shipped, in interstate commerce, and sold in various States of the United States, rubber heels which are duplicates of the rubber heels Nos. 1 to 9 inclusive, or any of them, listed in Interrogatory No. 1.

6. State which, if any, of the rubber heels Nos. 1 to 9 inclusive of Interrogatory No. 1 are duplicates of those of the O'Sullivan Rubber Company, Inc. of New York City referred to in Paragraph IX of Defendant's answer filed herein.

7. State which, if any, of the rubber heels Nos. 1 to 9 inclusive of Interrogatory No. 1 are duplicates of those of the Essex Rubber Company of Trenton, New Jersey referred to in Paragraph IX of Defendant's Answer herein.

8. If the rubber heels of O'Sullivan Rubber Company, Inc. of New York City and the rubber heels of Essex Rubber Company of Trenton, New Jersey referred to in Paragraph IX of Defendant's Answer herein are not like any of the rubber heels Nos. 1 to 9 inclusive listed in Interrogatory No. 1, furnish samples thereof.

9. State whether or not Defendant has, since May 28, 1901 and prior to the commencement of this suit, shipped or caused to be shipped in interstate commerce and sold in the various States of the United States the rubber heels of O'Sullivan Rubber Company, Inc. of New York City referred to in Paragraph IX of Defendant's Answer herein.

10. State whether or not Defendant has, since May 28, 1901 and prior to the commencement of this suit, shipped or caused to be shipped in interstate commerce and sold in the various States of the United States the rubber heels of Essex Rubber Company of Trenton, New Jersey referred to in Paragraph IX of Defendant's Answer herein.

11. If the answer to Interrogatory No. 1 is in the affirmative, state whether or not Defendant associated or mixed together said heels in displaying and offering them for sale.

12. If the answer to Interrogatory No. 11 is in the affirmative, state which of said rubber heels were associated or mixed together.

[fol. 21] 13. If the answer to Interrogatory No. 1 is in the affirmative, state when Defendant began to display, offer for sale and sell rubber heels bearing each type of colored

mark exemplified by the rubber heels listed in Interrogatory No. 1.

14. State whether or not Defendant in any way induced the Essex Rubber Company of Trenton, New Jersey or the Sure Foot Heel and Rubber Company of Gettysburg, Pennsylvania or the O'Sullivan Rubber Company, Inc. of New York City, or any others, to begin to use on rubber heels the colored marks of the rubber heels listed in Interrogatory No. 1, or any of them.

Note: The foregoing Interrogatories are to be answered by the officer or officers of the Defendant company who have knowledge of the facts inquired about.

Mishawaka Rubber and Woolen Manufacturing Company, by (S.) Thos. S. Donnelly, Its Solicitor.

(S.) Eugene M. Giles, Counsel for Plaintiff.

IN UNITED STATES DISTRICT COURT

ANSWERS OF DEFENDANT, S. S. KRESGE COMPANY, TO PLAINTIFF'S INTERROGATORIES—Filed February 28, 1935

Now comes the defendant, S. S. Kresge Company, and makes answer unto certain of plaintiff's interrogatories heretofore filed, as follows:

Answer to Interrogatory No. 1—

Yes.

[fol. 22] Answer to Interrogatory No. 2—

This information is being obtained from the manufacturers and will be furnished at a later date. Unless furnished by the manufacturers, we will be unable to supply the information, our invoices having been destroyed.

Answer to Interrogatory No. 3—

We have stores at the street addresses stated in the following cities listed in the plaintiff's interrogatories: Chicago, Indianapolis, New Albany, South Bend, Detroit, Kalamazoo, Minneapolis, St. Paul, Lincoln, Orange, Buffalo,

Cleveland, Columbus, Springfield, O., Chester, Pittsburgh, Wilkes-Barre, Lynchburg, Clarksburg, Milwaukee.

We do not have stores at the addresses stated in the following cities listed in plaintiff's interrogatory No. 3: Dubuque, St. Louis, Schenectady. For your information, we have stores near the addresses listed by the plaintiff who has evidently made a clerical error.

The requested addresses of our Bloomington, Indiana stores are:

Store No. 380 101 N. College Street
Store No. 1074 109 N. College Street, and
of our Richmond, Indiana Store, 801 E. Main Street.

Answer to Interrogatory No. 4—

Defendant's heels, No. 1 to No. 6 inclusive, were manufactured by Essex Rubber Company, H. S. Maddock, Receiver thereof, of Trenton, New Jersey. Defendant's heels No. 7 and No. 8 inclusive were manufactured by O'Sullivan Rubber Company, Inc., 366 Madison Avenue, New York City, or by their subsidiary, Sure-Foot Heel and Rubber Company, Gettysburg, Pa. Defendants heels No. 9 were manufactured by Boston Woven Hose & Rubber Company, Boston, Massachusetts.

Answer to Interrogatory No. 5—

Yes.

Answer to Interrogatory No. 6—

Defendant's heels No. 7 and No. 8.

Answer to Interrogatory No. 7—

Defendant's heels No. 1 to No. 6 inclusive.

Answer to Interrogatory No. 8—

See answers to interrogatories No. 6 and No. 7.

[fols. 23-28] Answer to Interrogatory No. 9—

Yes.

Answer to Interrogatory No. 10—

Yes.

Answer to Interrogatary No. 11—

To the best of our knowledge, no. It would not be our normal way of selling this merchandise.

Answer to Interrogatory No. 12—

To the best of our knowledge, the rubber heels of various kinds and manufacture were never associated or mixed together. It would not be our normal way of selling this merchandise.

Answer to Interrogatory No. 13—

No exact record of the exact date of first display and sale has been kept. We first began displaying and offering for sale the heels of the Essex Rubber Company in the fore-part of the year 1933; of the Boston Woven Hose & Rubber Company, in the fore-part of the year 1934 and of the O'Sullivan Rubber Company, Inc., in the summer of 1934.

Answer to Interrogatory No. 14—

No, as to the O'Sullivan Rubber Company, Inc. and its subsidiary, Sure-Foot Heel & Rubber Company. As to the Essex Rubber Company, no also.

We did suggest to the Essex Rubber Company that they add color to the heels that were sold in syndicate stores, but we did not induce them to begin the use of colored marks on their heels, which had been used by them for many years prior to selling this class of merchandise in syndicate stores.

S. S. Kresge Company, by (S.) E. A. Murphy, Assistant Secretary.

* * * * * * *

[fol. 29] IN UNITED STATES DISTRICT COURT

Plaintiff's Affidavits—Filed June 17, 1935

* * * * * * *

[fol. 30] AFFIDAVIT OF JULIUS C. BOHLING

* * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1924.

Having received a request from the plaintiff to do so I went into the store of the defendant at 1125 O Street in Lincoln, in the County of Lancaster and State of Nebraska, on February 26, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of counters of the defendant three pairs of rubber heels, two of the "Crusader" type and the other of the "Evergrip" type.

. . . . . .

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 76—Defendant's small circular red Crusader heel bought by Bohling in Nebraska".

. . . . . .

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 77—Defendant's medium circular orange Crusader heel bought by Bohling in Nebraska".

. . . . . .

[fol. 31] I submit herewith one of these heels with the tan colored circular mark as "Plaintiff's Exhibit No. 78—Defendant's circular tan Evergrip heel bought by Bohling in Nebraska".

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in the red, in the orange and in the tan colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

On March 16, 1935 at the request of the plaintiff, I again visited the store of the defendant which I had visited on February 26, 1934 at 1125 O Street, Lincoln, Nebraska, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant four pairs of rubber heels, two pairs being of the "Crusader" type, one pair of the "Evergrip" type and one pair of the "Sure Foot" type.

. . . . . .

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 102—Defendant's small circular orange Crusader heel bought by Bohling in Nebraska March 16, 1935".

. . . . . .

I submit herewith one of these heels with the yellow square mark as "Plaintiff's Exhibit No. 103—Defendant's [fol. 32] medium square yellow Crusader heel bought by Bohling in Nebraska March 16, 1935".

. . . . . .

I submit herewith one of these heels with the tan colored circular mark as "Plaintiff's Exhibit No. 104—Defendant's circular tan Evergrip heel bought by Bohling in Nebraska March 16, 1935".

. . . . . .

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 105—Defendant's medium circular red Sure Foot heel bought by Bohling in Nebraska March 16, 1935".

The rubber heels in said store were displayed March 16, 1935 in a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks in the orange color, the tan color and the red color, and rubber heels bearing the aforesaid square mark in the yellow color, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

. . . . . .

[fol. 33] AFFIDAVIT OF AUSTIN BRYAN

. . . . . .

I am employed by the plaintiff in the above entitled case and have been in its employ since January 25, 1914.

In August, 1934 I was requested by Mildred M. Cordier, another of the employees of the plaintiff to wear a pair of leather shoes with two rubber heels attached thereto

for the purpose of making a wear test of said rubber heels, and particularly to ascertain the wear results on two different red circular marks which were located in the central portion of the tread faces of the heels.

One of said rubber heels, that was attached on one of the shoes of the pair furnished to me at that time, was a new rubber heel manufactured by the plaintiff and had plaintiff's red circular trade mark thereon with the words "Trade Mark" embossed on the red circular trade mark, the word "Trade" being above the word "Mark". Said rubber heel and its mark were identical with the rubber heel and its mark submitted in this case as "Plaintiff's Exhibit No. 16—Plaintiff's rubber heel". The other of said rubber heels that was attached to the other shoe of the pair furnished to me at that time, was a new rubber heel which was marked "Crusader" and had a red circular mark with the figure of a knight's head embossed thereon. The last named rubber heel and its mark were identical with the rubber heel and its mark submitted in this case as "Plaintiff's Exhibit No. 28—Defendant's large circular red Crusader heel". Miss Cordier told me that the last named rubber heel was one of a pair of rubber heels which she had purchased in a store of the defendant in Elkhart, Indiana a few days before I began the wear test. I understand that Miss Cordier has made an affidavit in this case and that she has submitted the other rubber heel of the pair of Crusader heels she bought in defendant's [fol. 34] store as "Plaintiff's Exhibit No. 138—Defendant's large circular red Crusader heel bought by Mildred M. Cordier in Elkhart, Indiana".

Prior to beginning the wear test an identifying description was placed on the inside of the Crusader heel. In addition to this four holes were punched in the leather tongue of the shoe on which the Crusader heel was placed and one punch hole in the leather tongue of the other shoe for means of identification.

On August 30, 1934 I started wearing the said pair of shoes which were provided with one of the plaintiff's rubber heels and with one of the Crusader type of rubber heels as aforesaid, and I continued wearing these shoes almost daily until April 26, 1935. At various times during this period, Miss Cordier and I examined the heels

of said shoes and the marks on the heels and finally when the heels had become somewhat worn down the wear test was discontinued on April 26, 1935, at which time I delivered said shoes with the rubber heels attached thereto to the plaintiff. At the completion of said wear test on April 26, 1935, the superficial markings on the tread face of plaintiff's rubber heel were mostly worn away while the round red trade mark remained, and on the Crusader rubber heel the word "Crusader" was completely worn away and the knight's head embossing was somewhat worn on the red mark which still remained, and the red marks on both of said heels appeared conspicuously on the respective heels, although both heels and marks showed considerable wear. Although the two heels were worn by me simultaneously and for the same identical length of time, the Crusader heel showed more effects of wear than the plaintiff's heel.

I submit herewith the pair of shoes with the heels hereinbefore referred to made by the plaintiff and of the Crusader type as "Plaintiff's Exhibit No. 133—Pair of shoes bearing plaintiff's and Crusader type circular red marks worn by Bryan".

* * * * * * *

[fol. 35] AFFIDAVIT OF CHARLES W. BURTON

* * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1913.

Having received a request from the plaintiff to do so I went into the store of the defendant at 3-5 S. Main Street in Wilkes-Barre, in the County of Luzerne and State of Pennsylvania, on March 3, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant three pairs of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels with the red circular mark as "Plaintiff's Exhibit No. 51—Defendant's large circular red Crusader heel bought by Burton in Pennsylvania".

I also submit herewith one of the second pair of rubber heels purchased by me March 3, 1934 with an all red circular mark as "Plaintiff's Exhibit No. 52—Defendant's small circular red Crusader heel bought by Burton in Pennsylvania.".

. . . . . .

[fols. 36-37] I submit herewith one of these heels with the very small circular plain tan spot as "Plaintiff's Exhibit No. 53—Defendant's very small circular plain tan spot Crusader heel bought by Burton in Pennsylvania".

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular mark in the red color and in the plain tan color spot were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

. . . . . .

[fol. 38] AFFIDAVIT OF MILDRED M. CORDIER

. . . . . .

I am secretary to the Vice-President of the plaintiff company and have been employed as secretary and assistant in the office since the year 1922.

On August 10, 1934 I went into the store of the defendant in South Bend in said County and State and there examined carefully the display of rubber heels at one of the counters of the defendant. I found two types of rubber heels employing circular marks, one kind of the "Crusader" type having circular orange colored marks and the other the "Sure Foot" type having circular red marks. The marks of both types were in the central portion of the tread face of each heel. The marks in the "Crusader" rubber heels, which were circular orange marks, were like the mark in "Plaintiff's Exhibit No. 30—Defendant's medium circular orange Crusader heel" and the red circular marks in the rubber heels of the "Sure Foot" type were like "Plaintiff's Exhibit No. 35—Defendant's large circular red Sure Foot heel."

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rub-

ber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in both the orange and the red colors, were indiscriminately displayed together.

On August 15, 1934 at the request of the plaintiff I again went into the store of the defendant in South Bend and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters [fol. 39] of the defendant a pair of rubber heels of the "Sure Foot" type, exactly like those which I had previously seen in the said store on August 10, 1934.

The rubber heels of this pair had an all red circular mark in the central portion of the tread face. The red circular mark was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 35—Defendant's large circular red Sure Foot heel."

I submit herewith one of the Sure Foot type heels with the red colored circular mark which I purchased on August 15, 1934 as aforesaid, as "Plaintiff's Exhibit No. 88—Defendant's large circular red Sure Foot heel bought by Mildred M. Cordier in South Bend, Indiana."

The other rubber heel of the pair of rubber heels which I purchased August 15, 1934 at the defendant's store in South Bend, Indiana was attached on one of a pair of leather shoes of plaintiff's manufacture to give the rubber heel with the red circular "Sure Foot" mark in it a wear test. The other shoe of said pair had thereon a rubber heel of plaintiff's manufacture and identical with the red circular mark in "Plaintiff's Exhibit No. 16—Plaintiff's rubber heel," and with plaintiff's red circular trade mark on the tread face thereof. I supervised the placing of the "Sure Foot" heel on the one of said pair of shoes and the preparations for the wear test, and inquired concerning the progress of the test from time to time. Mr. Kenneth L. Keene, an employee of the plaintiff, was selected to wear the pair of shoes and to make the wear test. Prior to making the test an identifying description was placed on the inside of the "Sure Foot" heel, and in addition, two punch holes have been placed in the leather tongue of the shoe bearing the rubber heel of the "Sure Foot" type for purposes of identification. Mr. Keene started wearing the said pair of shoes on August 21, 1934 and he was instructed to wear them until the indian head design of the "Sure Foot" type trade mark had been substantially worn down

to show the condition of the two circular red marks after a period of wear of the shoes bearing them.

The pair of shoes referred to bearing the two circular red marks were worn by Mr. Keene until December 13, 1934 when he turned them over to me for use in the above entitled cause. The pair of shoes referred to is submitted with the affidavit of Kenneth L. Keene as "Plaintiff's Exhibit No. 126—Pair of shoes bearing plaintiff's and Sure Foot type circular red marks worn by Keene."

[fol. 40] On August 15, 1934, also at the request of the plaintiff, I went into the store of the defendant in Elkhart, Indiana, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant a single pair of rubber heels of the "Crusader" type.

The rubber heels of this pair had an all red circular mark in the central portion of the tread face. The red circular mark was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 28—Defendant's large circular red Crusader heel."

I submit herewith one of the "Crusader" type heels with the red colored circular mark which I purchased on August 15, 1934 as aforesaid, as "Plaintiff's Exhibit No. 138—Defendant's large circular red Crusader heel bought by Mildred M. Cordier in Elkhart, Indiana."

The other rubber heel of the pair of rubber heels of said "Crusader" type which I purchased August 15, 1934 at the defendant's store in Elkhart, Indiana, was attached on one of a pair of leather shoes of plaintiff's manufacture to give the rubber heel with the red circular "Crusader" mark in it a wear test. The other shoe of said pair had thereon a rubber heel of plaintiff's manufacture and identical with the red circular mark in "Plaintiff's Exhibit No. 16—Plaintiff's rubber heel," and with plaintiff's red circular trade mark on the tread face thereof. I supervised the placing of the said "Crusader" heel on the one of said pair of shoes and the preparations for the wear test, and inquiring concerning the progress of the test from time to time. Austin Bryan, an employee of the plaintiff, was selected to wear the pair of shoes and to make the wear test. Prior to making the test an identifying description was placed on the inside of the "Crusader" heel, and in addition, four punch holes have been placed in the leather tongue of the shoe bearing the rubber heel of the

"Crusader" type and one punch hole in the leather tongue of the other shoe, for purposes of identification. Mr. Bryan started wearing the said pair of shoes on August 30, 1934 and he was instructed to wear them until the knight's head design of the "Crusader" type mark had been substantially worn down to show the condition of the two circular red marks after a period of wear of the shoes bearing them. [fol. 41] The pair of shoes referred to bearing the two circular red marks were worn by Mr. Bryan until April 26, 1935 after which he turned them over to me for use in the above entitled cause. The pair of shoes referred to is submitted with the affidavit of Austin Bryan as "Plaintiff's Exhibit No. 133—Pair of shoes bearing plaintiff's and Crusader type circular red marks worn by Byran."

On September 11, 1934 I again visited the defendant's store in South Bend and purchased a pair of rubber heels of the "Crusader" type. The heels which I purchased were "paired up" and secured together, but I noticed on separating them that one was a red centered heel and the other was an orange centered heel. The red centered heel was on top with the orange centered heel below it. This shows that in "pairing" this pair of heels the red and the orange circular marked heels were mixed. The red circular mark of one of the heels is like the mark in "Plaintiff's Exhibit No. 29—Defendant's medium circular red Crusader heel," except it is smaller and the circular orange mark in the other heel is like " Plaintiff's Exhibit No. 31—Defendant's small circular orange Crusader heel."

These two heels have been secured together but each has been separately marked. One is marked as "Plaintiff's Exhibit No. 89—Defendant's small circular red Crusader heel bought by Mildred M. Cordier at South Bend, Indiana—attached to orange marked heel" and "Plaintiff's Exhibit No. 90—Defendant's small circular orange Crusader heel bought by Mildred M. Cordier at South Bend, Indiana—attached to red marked heel."

On November 5, 1934 I again visited the store of the defendant in South Bend, Indiana and there purchased from a sales-person of the defendant engaged in the sale of rubber heels a pair of rubber heels of the "Crusader" type, but having a square yellow mark in the central portion of the tread face. The square mark was identical with the mark of the heel of "Plaintiff's Exhibit No. 33—Defendant's large square yellow Crusader heel."

I submit herewith one of these heels with the square yellow mark which I purchased on November 5, 1934 as aforesaid, as "Plaintiff's Exhibit No. 91—Defendant's large square yellow Crusader heel bought by Mildred M. Cordier in South Bend, Indiana."

[fol. 42] At this time, to wit November 5, 1934 in said store there were displayed on the counter rubber heels bearing the aforesaid square yellow mark of the "Crusader" type and also rubber heels bearing the circular orange marks of the "Crusader" type and in addition thereto, rubber heels with the circular red marks of the "Sure Foot" type, and these rubber heels bearing said marks of the three different colors were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

I again visited the South Bend store at the request of the plaintiff March 5, 1935 and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant four pairs of rubber heels, two pairs being of the "Crusader" type, one of the "Sure Foot" type and one of the "Evergrip" type.

The rubber heels of one pair of the "Crusader" type had an all orange circular mark in the central portion of the tread face. The orange circular mark was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 31—Defendant's small circular orange Crusader heel."

I submit herewith one of these heels with the orange colored circular mark which I purchased on March 5, 1935 as aforesaid, as "Plaintiff's Exhibit No. 114—Defendant's small circular orange Crusader heel bought by Mildred M. Cordier in South Bend, Indiana March 5, 1935."

The rubber heels of the second pair of "Crusader" type heels purchased by me March 5, 1935, had an all yellow square mark in the central portion of the tread face. The yellow square mark was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 33—Defendant's large square yellow Crusader heel" except it is smaller.

I submit herewith one of these heels with the yellow colored square mark which I purchased on March 5, 1935 as aforesaid, as "Plaintiff's Exhibit No. 115—Defendant's small square yellow Crusader heel bought by Mildred M. Cordier in South Bend, Indiana March 5, 1935."

[fol. 43] The rubber heels of the "Sure Foot" type purchased by me March 5, 1935, had an all red circular mark in the central portion of the tread face. The red circular mark was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 35—Defendant's large circular red Sure Foot heel."

I submit herewith one of these heels with the red colored circular "Sure Foot" mark which I purchased on March 5, 1935 as aforesaid, as Plaintiff's Exhibit No. 116—Defendant's large circular red Sure Foot heel bought by Mildred M. Cordier in South Bend, Indiana March 5, 1935."

The rubber heels of the "Evergrip" type purchased by me March 5, 1935, had an all tan circular mark in the central portion of the tread face. The tan circular mark was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 36—Defendant's circular tan Evergrip heel."

I submit herewith one of these heels with the tan colored circular mark which I purchased on March 5, 1935 as aforesaid, as "Plaintiff's Exhibit No. 117—Defendant's circular tan Evergrip heel bought by Mildred M. Cordier in South Bend, Indiana March 5, 1935."

The rubber heels in said store on March 5, 1935 were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular and square marks, in the orange, in the yellow, in the red and in the tan colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

The next day, i. e., March 6, 1935, I went to the store of the defendant in Elkhart in the County of Elkhart, Indiana, and I purchased there from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant five pairs of rubber heels, three pairs being of the "Crusader" type and two of the "Sure Foot" type.

The rubber heels of one pair of the "Crusader" type had an all red circular mark in the central portion of the tread face. The red circular mark was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 28—Defendant's large circular red Crusader heel."

[fol. 44] I submit herewith one of these heels with the red colored circular mark which I purchased on March 6, 1935,

as aforesaid, as "Plaintiff's Exhibit No. 118—Defendant's large circular red Crusader heel bought by Mildred M. Cordier in Elkhart, Indiana March 6, 1935."

The rubber heels of the second pair of "Crusader" type heels purchased by me March 6, 1935 had an all orange circular mark in the central portion of the tread face. The orange circular mark was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 30—Defendant's medium circular orange Crusader heel" except that it is larger.

I submit herewith one of these heels with the orange colored circular mark which I purchased on March 6, 1935 as aforesaid, as "Plaintiff's Exhibit No. 119—Defendant's large circular orange Crusader heel bought by Mildred M. Cordier in Elkhart, Indiana March 6, 1935."

The rubber heels of the third pair of "Crusader" type heels purchased by me March 6, 1935 had an all yellow square mark in the central portion of the tread face. The yellow square mark was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 33—Defendant's large square yellow Crusader heel."

I submit herewith one of these heels with the yellow colored square mark which I purchased on March 6, 1935 as aforesaid, as "Plaintiff's Exhibit No. 120—Defendant's large square yellow Crusader heel bought by Mildred M. Cordier in Elkhart, Indiana March 6, 1935."

The fourth pair of rubber heels which I purchased March 6, 1935, were of the "Sure Foot" type and had an all red circular mark in the central portion of the tread face. The red circular mark was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 35—Defendant's large circular red Sure Foot heel."

I submit herewith one of these heels with the red colored circular mark which I purchased on March 6, 1935 as aforesaid, as "Plaintiff's Exhibit No. 121—Defendant's large circular red Sure-Foot heel bought by Mildred M. Cordier in Elkhart, Indiana March 6, 1935."

[fol. 45] The fifth pair of rubber heels which I purchased March 6, 1935, were also of the "Sure Foot" type and had a mark without color in the central portion of the tread face. This mark was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 38—Defendant's plain Sure Foot heel."

I submit herewith one of these heels with the "Sure Foot" mark without color which I purchased on March 6, 1935 as aforesaid, as "Plaintiff's Exhibit No. 122—Defendant's plain Sure Foot heel bought by Mildred M. Cordier in Elkhart, Indiana March 6, 1935."

The rubber heels in said store on March 6, 1935 were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular and square marks in the red, orange and yellow colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid on that date were a part of and selected from said display.

* * * * * * *

[fol. 46] AFFIDAVIT OF FRANCIS J. CORR

* * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1934.

Having received a request from the plaintiff to do so I went into the store of the defendant at 98 Main Street in White Plains in the County of Westchester and State of New York, on March 19, 1935, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant two pairs of rubber heels of the "Sure Foot" type.

* * * * * * *

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 123—Defendant's medium circular red Sure Foot heel bought by Corr in White Plains, N. Y., March 19, 1935."

* * * * * * *

I submit herewith one of these heels with the green colored circular mark as "Plaintiff's Exhibit No. 124—De-
[fol. 47] fendant's large circular green Sure Foot heel bought by Corr in White Plains, N. Y., March 19, 1935."

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bear-

ing the aforesaid circular marks in both the red and the green colors were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

* * * * * * *

[fol. 48] AFFIDAVIT OF JOHN L. DUNCAN

* * * * * * *

I am in the employ of the plaintiff in the Office Sales Department and have been in the employ of the plaintiff since the year 1922.

Having received a request from the plaintiff to do so I went into the store of the defendant in South Bend in said County and State, on August 1, 1934 and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant a pair of rubber heels of the "Sure Foot" type.

* * * * * * *

I submit herewith one of these rubber heels with the red colored circular mark as "Plaintiff's Exhibit No. 54—Defendant's large circular red Sure Foot heel bought by Duncan at South Bend, Indiana."

While in the said store at South Bend I saw a number of rubber heels having an all orange circular mark in the central portion of the tread face. The orange circular mark [fol. 49] was identical with the mark of the heel submitted in this case as "Plaintiff's Exhibit No. 30—Defendant's medium circular orange Crusader heel."

On August 2, 1934 I returned to the said store at South Bend to ascertain how long they had been handling this "Sure Foot" rubber heel with the red circular mark in the heel. I was told by the clerk who waited on me and who seemed to be very well informed that up until the last shipment of "Sure Foot" heels which had been received they did not have any red circular mark. I saw some of these "Sure Foot" heels in the Kresge store on August 2, 1934 and they were made of black rubber and there were others of brown rubber, each having an indian head of the same material without any color. The rubber heels which I saw which did not employ any color but had a mark of the same

color as the balance of the heel were identical with the mark on "Plaintiff's Exhibit No. 38—Defendant's plain Sure Foot heel."

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks in both the red and the orange colors, and also without color, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

* * * * * * *

[fol. 50] AFFIDAVIT OF EARLE J. W. FINK

* * * * * * *

I am the president and general manager of the Mishawaka Rubber and Woolen Manufacturing Company, the above named plaintiff, which has its office and principal place of business at Mishawaka in said County and State.

I have been in the employ of and actively connected with the business of the plaintiff company for approximately thirty-eight years, having on November 23, 1897 entered the employ of the plaintiff company, which was then named Mishawaka Woolen Manufacturing Company, and having been made its Manager of Sales in 1908, its Assistant General Manager in 1915, its General Manager in 1921 and its President and General Manager in 1930, and by reason of my employment and connection with the plaintiff company throughout the approximately thirty-eight years, as aforesaid, and the nature of my work for the plaintiff company during all that time, I have had intimate contact with the business of the plaintiff company and have had access to and have examined its books and records, and I am familiar with the early history of plaintiff company and its business, both before and after my employment commenced, as aforesaid, including the character of goods which it manufactured, sold and distributed, the trade marks that it used thereon and the various other matters and things recited hereinafter.

Plaintiff company was established and commenced manufacturing various woolen products in 1868 and it has manufactured, sold and distributed woolen footwear of various kinds continuously since 1886. Since prior to 1900 and con-

[fol. 51] tinuously since then, plaintiff has sold and distributed rubber footwear with rubber heels attached thereto, which said rubber footwear was manufactured for plaintiff prior to 1898 and manufactured by it in its own plant since early in 1898. Since prior to 1901, plaintiff has manufactured, sold and distributed combination leather and rubber footwear with rubber heels attached thereto and since 1916 it has manufactured, sold and distributed leather shoes with rubber heels attached thereto, and it has since early in 1898 manufactured in its own plant, rubber heels for use on its rubber boots and shoes, combination rubber and leather boots and shoes and leather shoes.

On or about October 15, 1891, plaintiff adopted and began to use a red circular figure or ball colored red as a trade mark on and in connection with its goods, which said mark is the trade mark involved in this suit, and has been used continuously by plaintiff since October 15, 1891, on or in connection with its various goods above mentioned and other goods in interstate and foreign trade, and said mark has been used on and applied directly to the tread face of plaintiff's rubber heels continuously since early in 1898.

Since plaintiff, on October 15, 1891 adopted and began to use the red circular figure trade mark on and in connection with its goods its business has increased and expanded, and it has manufactured, sold and distributed and used its red circular figure trade mark on a large variety of goods, mostly in the footwear line. Catalogs and pamphlets of its footwear were prepared and put out from time to time by plaintiff and distributed to its trade throughout the United States, and in these catalogs and pamphlets, which illustrated articles that plaintiff had theretofore been selling and was offering for sale and selling at the time of the issuance of the catalog or pamphlet, plaintiff conspicuously and constantly emphasized the red circular figure as its trade mark.

A copy of such catalog issued and distributed by plaintiff in 1900 and 1901, which is the earliest catalog that plaintiff has found available, is submitted herewith as and marked "Plaintiff's Exhibit No. 10—Plaintiff's 1900-1901 catalog," and a copy of plaintiff's 1901-1902 catalog is also submitted herewith as and marked "Plaintiff's Exhibit No. 11—Plain-[fol. 52] tiff's 1901-1902 catalog," and a copy of plaintiff's 1930 catalog is submitted herewith as and marked "Plaintiff's Exhibit No. 12—Plaintiff's 1930 catalog," and a copy

of plaintiff's 1934-1935 catalog is submitted herewith as and marked "Plaintiff's Exhibit No. 13—Plaintiff's 1934-1935 catalog," and all of these catalogs illustrate goods and articles that plaintiff had been making and selling and distributing and on and in connection with which plaintiff had been using the red circular figure trade mark before the date given for each respective catalog. A copy of a price list of plaintiff's goods put out by plaintiff in 1917 and listing goods that plaintiff was manufacturing, selling and distributing in 1917, and prior thereto, is also submitted herewith as and marked "Plaintiff's Exhibit No. 14—Plaintiff's 1917 price list" and a small pamphlet entitled "More Days Wear" put out by plaintiff in 1922 and illustrating some of the goods that plaintiff was manufacturing, selling and distributing in 1922 and prior thereto, is also submitted herewith as and marked "Plaintiff's Exhibit No. 15—Plaintiff's 1922 pamphlet." Plaintiff at the time of issuance of said 1917 price list and said 1922 pamphlet was using its red circular figure trade mark on and in connection with the goods listed and illustrated respectively therein.

On its rubber footwear of the kinds illustrated in the 1900-1901 catalog, Plaintiff's Exhibit No. 10, on pages 15, 16, 18, 19, 20, 21, 22, 30, 31, 32, 33, 35, 36, 37, 39, 42, 43, 44, 45, 46 and on page 6 (excepting that designated as "Women's Perfection") and on page 29 (excepting the two designated respectively as "Logan" and "Grant"), plaintiff since the early part of 1898 had used and at the time it issued said catalog was using rubber heels on which the red circular trade-mark appeared on the bottom of the tread face of the heel as shown by the dark circular mark on the heel of the bottom view of the boot appearing on page 39 of said catalog (Plaintiff's Exhibit No. 10) and as shown in color in the heel illustrations composing the border on the back cover page of said catalog (Plaintiff's Exhibit No. 10), and plaintiff has continued since then to so use the red circular trade mark on the heels of such rubber footwear and to sell such footwear with the heels thus marked in interstate trade. Said rubber heels, were cemented onto the shoe and were also provided with nail holes at the corners and at the middle of the back, as illustrated in the heels on the back [fol. 53] cover page of said catalog (Plaintiff's Exhibit No. 10) and nails were employed in these nail holes, as indicated on the bottom view appearing on page 39 of said cata-

log (Plaintiff's Exhibit No. 10) for attaching the heels more securely to the shoes. Said rubber heels, like those illustrated on the back cover page of Plaintiff's Exhibit No. 10, and on page 39 of said Exhibit, bore, in addition to the red circular trade mark and in a relatively inconspicuous manner the words "First Quality, Ball Band," over the red circular mark and the words "Trade Mark, Rubbers, Mishawaka, Ind." under the red circular mark. On the goods and articles that had rubber heels bearing the red circular trade mark on the tread face as aforesaid, it was and has been the practice of plaintiff to also apply the red circular figure elsewhere on the article, as for example, at the top of its rubber boots as shown on the side view of the boot and on the front view of the upper part of the boot appearing on page 39 of said 1900-1901 catalog, Plaintiff's Exhibit No. 10.

Since prior to 1900 plaintiff has been putting out leather topped footwear such as the "Logan" illustrated on pages 34 and 47 of the aforesaid 1900-1901 catalog, Plaintiff's Exhibit No. 10, with the red circular trade mark thereon and since prior to 1901, plaintiff has been putting out leather topped footwear such as the "Lawton" illustrated on pages 32 and 47 of plaintiff's 1901-1902 catalog, Plaintiff's Exhibit No. 11, with rubber heels thereon bearing the red circular trade mark on the tread face thereof. Since the early part of 1916, plaintiff has been putting out all leather shoes, usually with rubber compounded sole and these so-called all leather shoes had rubber heels bearing the red circular figure on the tread face of the heel, such leather shoes bearing said rubber heels with the red circular mark on the tread face thereof being listed at the bottom of page 9 of Plaintiff's 1917 price list Plaintiff's Exhibit No. 14, as "Mishko Sole Letho Shoe" and illustrated under that name on page 4 of plaintiff's 1922 pamphlet, Plaintiff's Exhibit No. 15, and shown on pages 16 to 20 inclusive of plaintiff's 1930 catalog, Plaintiff's Exhibit No. 12, and on pages 27 to 30 inclusive of plaintiff's 1934-1935 catalog, Plaintiff's Exhibit No. 13. A sample of the rubber heel used on said leather shoes is submitted herewith as and marked "Plaintiff's Exhibit No. 16—Plaintiff's rubber heel," and a sample of said shoe with the heel attached is submitted herewith as and marked "Plaintiff's Exhibit No. [fol. 54] 17—Plaintiff's leather shoe." Since 1916, plaintiff has continued to put out and to sell in interstate trade

such leather shoes with heels bearing the trade mark as shown in Plaintiff's Exhibits Nos. 16 and 17. Plaintiff makes and has for many years made said rubber heels in various sizes and in rubber of other colors besides black, a sample of a brown rubber heel for ladies' shoes being submitted herewith as and marked "Plaintiff's Exhibit No. 18—Plaintiff's ladies' heel," and on all such rubber heels of other colors and sizes, plaintiff has used its red circular figure trade mark on the center of the tread face of the heel.

On its low heeled footwear, such as illustrated in the aforesaid 1900-1901 catalog, Plaintiff's Exhibit No. 10, on pages 17, 34, 38, 40, 41 and 47, it has been the practice of plaintiff since prior to 1900 to apply its red circular figure trade mark on the shank of the sole substantially as it is shown by the circular marking on the two shoe bottoms illustrated on page 40 of said catalog, Plaintiff's Exhibit No. 10.

Having used the red circular trade mark on its goods since October 15, 1891, plaintiff, in the early part of 1898, adopted the expedient of and began applying its red circular trade mark on the tread face of its rubber heels at approximately the center thereof, *as shown on the back* cover page of Plaintiff's 1900-1901 catalog, Plaintiff's Exhibit No. 10, and on the boot bottom illustrated on page 39 of said catalog, (Exhibit No. 10) and as shown on the back cover page of Plaintiff's 1901-1902 catalog, Plaintiff's Exhibit No. 11, and on the boot bottom illustrated on page 34 of said catalog (Exhibit No. 11), and has since then continued to apply said mark in this manner and at his place thereon, and plaintiff has also, on the same footwear to which said trade marked rubber heels were attached, used its red circular trade mark elsewhere thereon, as for example at the top of the upper, as shown on the illustration of the boot top on page 39 of its 1900-1901 catalog, Plaintiff's Exhibit No. 10, and on page 35 of its 1901-1902 catalog, Plaintiff's Exhibit No. 11, and as shown in other catalogs and advertising submitted as exhibits herewith.

Aside from its trade mark significance, the peculiar arrangement of a mark or spot of conspicuous contrasting color on the tread or wearing face of rubber heels was believed to be and is believed to have been a unique, unusual [fol. 55] and striking feature and is believed to have been and to be a feature that has been and is regarded by the

purchasing public as a characteristic peculiar to, typical of and signifying plaintiff's goods, and is of great value to plaintiff in its business, and it is believed that the purchasing public, knowing of this unique and peculiar marking of plaintiff's rubber heels, will regard and do regard rubber heels like those of the defendant, with spots of bright or contrasting colors on the tread faces thereof, as of the same origin as plaintiff's rubber heels and especially so when such heels with their various spots of bright or contrasting colors are sold in the same stores and at the same places on the counters and are mixed and associated with rubber heels bearing red circular marks similar to the trade mark of plaintiff. To impress the purchasing public with the significance of the red circular mark as a distinguishing mark for its rubber heels and to emphasize plaintiff's peculiar ensemble or arrangement of a mark or spot of conspicuous contrasting color on the tread face of the heel, plaintiff in its early advertising featured this heel mark and ensemble as shown on the back cover page of its 1900-1901 catalog, Plaintiff's Exhibit No. 10 and on the back cover page of its 1901-1902 catalog, Plaintiff's Exhibit No. 11 and plaintiff has continued since then to feature in its catalogs and advertising said arrangement of its trade mark on its rubber heels as shown in the catalogs and advertising matter submitted herewith.

At the time plaintiff began to use its red circular figure trade mark on the tread face of its rubber heels in the early part of 1898 as aforesaid, a circular recess was provided in the tread face of the heel and a thin red circular disk was placed and secured in the bottom of said recess, and this practice was continued by plaintiff until about 1917, at which time, in order to make the red circular figure a more permanent marking which would endure and remain conspicuous as and during the time that the rubber heel was worn down in actual use, plaintiff began to apply the red circular trade mark and since then has continued to apply said mark to its rubber heels by embedding a plug of red rubber in the tread face of the heel. A sample of plaintiff's rubber heel cut apart to show the rubber plug thus embedded in the rubber heel is submitted herewith as and marked "Plaintiff's Exhibit No. 19—Plaintiff's mutilated rubber heel."

[fol. 56] Plaintiff does not sell its red trademarked rubber heels separately and although it has been requested to do so

and although affiant believes that it could have sold large quantities thereof and have derived large gains and profits therefrom on account of the favorable reputation that has been established for its goods and the popularity thereof and the widespread and long familiarity of the purchasing public with its red circular trade mark, plaintiff has continually and consistently refrained from and refused to sell its red trademarked rubber heels separately from its own boots and shoes as it is believed that the use of such separately sold heels with plaintiff's trade mark and peculiar conspicuous contrasting colored spot ensemble by others on any sort of shoes on which they might wish to use them would confuse others into believing that the entire boot or shoe bearing such heel was a product of this plaintiff and that plaintiff's reputation would be greatly jeopardized and its business greatly impaired. The only exception to the above practice that affiant is aware of is in the case of a customer in New Zealand who found it necessary to discontinue importing our complete leather shoes on account of a prohibitive tariff on leather shoes and to whom we have since the prohibitive tariff furnished a small quantity of trademarked rubber heels.

Rubber heels are not only believed to be regarded by the purchasing public as a product usually made by manufacturers of rubber footwear but they have been held to be goods of the same descriptive properties as plaintiff's products in a recent decision, (which has not yet been reported) by the First Assistant Commissioner of Patents in an opposition by this plaintiff against Panco Rubber Company to prevent registration by said Panco Rubber Company of a red oval mark with the word "Panco" embossed thereon for Whole Soles, Heels, and Taps, copy of which said decision is submitted herewith as "Plaintiff's Exhibit No. 145—Mishawaka v. Panco decision." Moreover defendant's heels which are believed to be intended and used mainly for the repair of old shoes that have been worn to such an extent that the original heels required replacement, when put to their intended use on the shoes are believed to have exactly the same effect in signifying origin of the heel and shoe as plaintiff's trade mark on the heels of its shoes. [fol. 57] Plaintiff on April 9, 1898 having used its said red circular figure trade mark on and in connection with its various goods in interstate and foreign trade, made application to register said trade mark for said goods

in the United States Patent Office, and a certificate of registration No. 36,471 registered May 28, 1901 was issued to the plaintiff. A certified copy of this registration, together with its later renewal for a period of twenty years from May 28, 1931 is submitted herewith as and marked "Plaintiff's Exhibit No. 20—Plaintiff's Registration No. 36,471 and Renewal."

The trade mark of the plaintiff involved in this suit, has not been disposed of or abandoned since its adoption by plaintiff in October, 1891, and the said registration No. 36,471 has been continuously owned and is still owned by the plaintiff as shown by the accompanying certified copy of abstract of title relating to the same secured from the United States Patent Office and submitted herewith as and marked "Plaintiff's Exhibit No. 21—Abstract of title of plaintiff's Registration No. 36,471."

I also submit herewith a certified copy of articles of association of the plaintiff company and amendment changing the name of Mishawaka Woolen Manufacturing Company to Mishawaka Rubber and Woolen Manufacturing Company, as filed February 4, 1874 and September 18, 1923, respectively, as "Plaintiff's Exhibit No. 22—Certified copy of plaintiff's articles of association and amendment changing its name." I also submit herewith a certified copy of proceedings relating to the extension of the plaintiff company from January 22, 1924 to January 12, 1974, as "Plaintiff's Exhibit No. 23—Certified copy of extension of existence of plaintiff."

During the nearly forty-five years since plaintiff adopted and began to use its aforesaid red circular figure trade mark, the footwear and rubber heels that it put out under said trade mark have been of the highest quality and its whole business and reputation for high quality of its products has been built around said mark, and said mark has been applied on and used in connection with plaintiff's various goods and products throughout that time and is still being likewise used on and in connection with plaintiff's various goods and products, and plaintiff's said trade mark became, has been and is popular, very widely and favorably known and of great value to plaintiff in its business.

[fol. 58] With its red circular figure trade mark, plaintiff frequently associates the words "Ball-Band," which are

a separate trade mark and separately registered as such in the United States Patent Office under Registration No. 36,151 granted to plaintiff on April 2, 1901. A copy of plaintiff's said Registration No. 36,151 is submitted herewith as and marked "Plaintiff's Exhibit No. 24—Plaintiff's Ball-Band registration." Said mark and words have been and are associated by plaintiff in various different ways, sometimes with the red circular figure appearing between the words "Ball" and "Band," sometimes with the red circular figure at the side of or above or below the words "Ball-Band," sometimes with the words "Ball-Band" quite remote from the red circular figure and sometimes the red circular figure trade mark is used alone as shown on the illustration of the shoe bottom at the middle of page 23 of plaintiff's 1930 catalog, Plaintiff's Exhibit No. 12, and on the shoe bottom illustrated on page 40 of plaintiff's 1934-1935 catalog, Plaintiff's Exhibit No. 13, and as shown on the bottom of the sport shoe which is submitted herewith as and marked "Plaintiff's Exhibit No. 25—Plaintiff's sport shoe," which varied and independent use is indicated and contemplated in plaintiff's "Ball-Band" registration, Plaintiff's Exhibit No. 24, wherein it is stated (page 1, lines 25 to 33)

"Said company frequently associates said trade-mark word 'Ball-Band' with the representation of a circular figure or ball colored red, which further representation is used as an additional distinguishing mark or brand for its goods and constitutes a separate trade-mark, which may be used alone or in connection with said trade-mark word, as may be desired or preferred."

and also in plaintiff's red circular figure registration, Plaintiff's Exhibit No. 20, wherein it is stated (page 1, lines 92 to page 2, line 9)

"Said company frequently associates said trade-mark with the word-symbol or compound word 'Ball-Band,' which word is used as an additional distinguishing mark or brand for its goods and constitutes a separate trade-mark, which may be used alone or in connection with said trade-mark consisting of the representation of a circular figure or ball, as may be desired or preferred. It does not, however, in any way or to any extent wish to limit or abridge [fol. 59] any rights for which it may now be entitled to

protection arising from any of the added features which have been by it associated with said trade-mark, consisting of a representation of a circular figure or ball colored red, and which have become known to its trade in connection therewith.

It has been and is a common practice of plaintiff, especially when the words "Ball-Band" appear in proximity to the red circular figure trade mark to give the red circular figure special significance as a separate and distinct trade mark by applying the words "Trade-Mark" directly on the red circular figure.

On its rubber heels, plaintiff applies the "Ball-Band" trade-mark, its address and other markings superficially and somewhat inconspicuously in small raised letters which soon wear off and disappear when the heel is worn, whereas plaintiff applies its red circular figure trade mark to said heels, as aforesaid, by embedding in the heel a circular plug of red rubber, (which bears the words "Trade Mark") so that its heels will retain the red circular figure mark long after the "Ball-Band," plaintiff's address and other markings has disappeared, this being the characteristic manner in which plaintiff has been for a great many years and is now marking its rubber heels.

Since plaintiff adopted and began to use the red circular figure trade mark in October, 1891, it has up to and including the year 1934, used said red circular figure trade-mark on goods and merchandise to the amount of about $370,000,000, which said goods and merchandise have been sold and distributed by plaintiff throughout the United States and in many foreign countries. Since 1898, when plaintiff first began to use the red circular mark on rubber heels, the total value of all footwear that the plaintiff has sold and distributed having rubber heels thereon bearing plaintiff's circular red mark is approximately $185,700,000. Since October 15, 1891 to the present time, plaintiff has made and has sold and distributed in connection with its footwear approximately 150,000,000 rubber heels, all of which bore its red circular trade mark on the tread faces thereof.

Plaintiff has over 61,000 customers and dealers who buy and distribute goods of the plaintiff bearing the red circular trade mark, and the places of business of these [fol. 60] dealers and customers are distributed through-

out every State of the United States, the District of Columbia and many foreign countries.

There are approximately 800 customers and dealers in the Eastern District of Michigan, many of whom are in the Southern Division thereof and some of whom are in the city of Detroit, and these customers and dealers are and for many years past have been selling in the said District and the Southern division thereof and in the city of Detroit, the goods of plaintiff including rubber heels bearing the circular red ball trade mark involved in this suit. The plaintiff company has throughout substantially its entire existence been selling its products in said District, Division and City and throughout substantially the entire time since October 15, 1891 has been selling its goods bearing the red circular trade mark in said District, Division and City and throughout substantially the entire time since the early part of 1898 has been selling in said District, Division and City footwear with rubber heels bearing the red circular trade mark, and throughout substantially the entire time since 1916 has been selling in said District, Division and City so-called all leather shoes with rubber heels bearing its red circular trade mark. Plaintiff for many years has had a salesman, Mr. J. A. Mogle, living in Detroit, who has sold and sells plaintiff's goods regularly to residents of said City and elsewhere in the vicinity thereof. The goods and merchandise manufactured by the plaintiff are on sale in many places of business in Detroit and elsewhere in the Eastern District of Michigan and show the trade mark involved in this suit, and the trade mark is known not only to thousands of people in the said City and District, but to countless thousands of people in the United States.

Throughout the time since October 15, 1891 when plaintiff adopted and began to use the red circular trade mark on its goods, plaintiff has advertised its goods and products extensively and in various ways throughout the United States and elsewhere and has spent millions of dollars in such advertising in which the red circular trade mark and the application and use of said mark on the tread face of its rubber heels was portrayed prominently and conspicuously and urged as a reliable means for distinguishing and recognizing plaintiff's goods. Since 1909 plaintiff has spent more than three and one-quarter million dollars in such advertising, which amount is exclusive of catalogs, circulars,

[fol. 61] cartons, shipping cases and stationery, which bore the red circular figure trade mark and also exclusive of salaries and wages that were spent by plaintiff in connection with such advertising. I have been unable to ascertain a definite or approximate figure of the amount spent by plaintiff in its advertising prior to 1909 and after plaintiff adopted and began to use the red circular trade mark in October, 1891, but I know that during that time plaintiff spent a large sum of money amounting to many thousands of dollars in such advertising.

The aforesaid advertising carried on by plaintiff has been in many ways and of various forms. Many hundreds of thousands of catalogs have been put out and distributed by plaintiff, which are not included in the above estimate of plaintiff's advertising and these said catalogs included and emphasized the red circular trade mark, and plaintiff's catalog exhibits Nos. 10, 11, 12 and 13 are typical examples of the extent and prominence to which plaintiff displayed and directed attention to its red circular figure trade mark in its catalogs. Since plaintiff began to apply the red trade mark on the tread face of its rubber heels in the early part of 1898, plaintiff in its catalogs and other advertising has conspicuously featured and shown the contrasting colored spot or red trade mark on the tread face of its heels and to give prominence to this peculiar and recently adopted feature of its heel marking and to emphasize the significance of the mark as to origin and designation of its heels, plaintiff on its 1900-1901 and 1901-1902 catalogs, Plaintiff's Exhibits Nos. 10 and 11 respectively, displayed the heels alone as a border for the back cover page of each of said catalogs, and each of said heels had the red circular trade mark appearing thereon in red in substantially the same manner in which plaintiff at that time was using and since the early part of 1898 up to the present time has used and is now using its red circular trade mark on its rubber heels.

Other forms of plaintiffs advertising included advertisements in many magazines, farm papers, trade papers, newspapers, foreign language papers, and the like, including the following publications:

Saturday Evening Post.
Country Gentleman.
Colliers.

Literary Digest.
[fol. 62] Boys' Life.
Boot and Shoe Recorder.
The Farm Journal.
The Country Home.
The Prairie Farmer.
Kansas Farmer and Mail & Breeze.
Wallaces' Farmer and Iowa Homestead.
Southern Agriculturist.
Successful Farming.
The Nebraska Farmer.
Hoards' Dairyman.
Wisconsin Agriculturist and Farmer.
The Dakota—Farmer.
The Ohio Farmer.
The Farmer.
Hospodar.
Ladies Home Journal.
Good Housekeeping.
Woman's Home Companion.
The American Boy.
Field & Stream, and many others.

Samples of plaintiff's advertisements in some of the above mentioned publications are submitted herewith as and marked "Plaintiff's Exhibit No. 26—Plaintiff's publication advertisements." Other forms of plaintiff's advertising included out-door advertisements, bill board advertising, street car advertising, window stickers and displays, cut outs, cloth signs and banners, transparencies, circulars, posters, blotters, movie slides and such other forms of advertising as are used to reach and impress the entire purchasing public generally, and a few samples of plaintiff's said advertising are submitted herewith as and marked "Plaintiff's Exhibit No. 27—Plaintiff's miscellaneous advertising." I am also submitting herewith a copy of a salesmen's portfolio of advertising which was furnished by plaintiff to its salesmen for use in explaining and indicating to plaintiff's customers and prospective customers the amount and extent of plaintiff's advertising, the advertisements that plaintiff was using and suggestions for advertising and display of plaintiff's products by such customers, and said portfolio contains copies of advertisements of plaintiff which appeared in the publications and in

the issues thereof on the dates indicated therein. Said portfolio is submitted herewith as and marked "Plaintiff's Exhibit No. 39—Plaintiff's advertising portfolio."

[fol. 63] Plaintiffs advertising of the various forms above mentioned has been distributed widely throughout every State of the United States and in many foreign countries as well, the papers and magazines in which plaintiff has advertised its goods being for the most part nationally distributed and having a total of over fifteen million subscribers or regular buyers living in every section of the United States, and in all of its said advertising and other advertising, it has been and is the practice of plaintiff not only to display and give prominence and call attention to its red circular trade mark, but also in addition to specially display and otherwise emphasize the use of its red circular trade mark on its rubber heels.

Throughout the time that plaintiff has used the red circular trade mark and the ensemble of the contrasting spot on the tread face of its rubber heels, and until the acts of the defendant that plaintiff complains of, others generally have quite readily recognized and respected plaintiff's rights therein. In only two instances previous to the present action against this defendant, so far as affiant is aware and has been able to ascertain, has plaintiff found it necessary to seek relief from the Courts to compel respect for its trade mark, one of said cases having been brought before the United States Circuit Court for the Northern District of New York and the other having been brought before the United States District Court for the Southern District of Ohio, Eastern Division.

In the first of the above mentioned cases, brought by the plaintiff under its former name against Edward R. Rice, in Equity No. 6352, the Court by Honorable Alfred C. Coxe, on December 10, 1895 ordered and decreed a preliminary injunction against the defendant restraining him from infringement of the circular red trade mark. A certified copy of the preliminary injunction order entered in the case is submitted herewith as "Plaintiff's Exhibit No. 40—Certified copy of Order for Preliminary Injunction in New York Case." Thereafter Judge Coxe on July 2, 1896 entered a final decree in the case, following a settlement by the parties, and finding infringement against the defendant and making the preliminary injunction perpetual. A certified copy of the final decree as entered is submitted

herewith as "Plaintiff's Exhibit No. 41—Certified copy of Final Decree in New York Case."

[fol. 64] In the second above mentioned case in the United States District Court for the Southern Division of Ohio brought by the plaintiff under its former name against George Schlaegel and Conrad J. Schlaegel, co-partners doing business as Schlaegel Bros., the Court by Honorable John E. Sater, after a settlement of the cause, entered a final decree as to the circular red ball trade mark and perpetually enjoined the defendant from further infringement thereof, the final decree being entered and filed in the cause November 16, 1915. A certified copy of the final decree as entered is submitted herewith and is marked "Plaintiff's Exhibit No. 42—Certified copy of Final Decree in Ohio Case."

In May, 1933, plaintiff learned of the display and sale by defendant of rubber heels bearing a red circular mark similar to plaintiff's red circular trade mark and located approximately at the center of the tread face of the heel. A rubber heel purchased in May of 1933 in a store of defendant and bearing the red circular mark above referred to is submitted herewith as and marked "Plaintiff's Exhibit No. 43—Defendant's 1933 heel." Other rubber heels of this defendant employing trade marks in or at the central portions of the tread faces thereof and purchased after 1933 by or for plaintiff from stores of defendant are submitted herewith as and marked:

"Plaintiff's Exhibit No. 28—Defendant's large circular red Crusader heel",

"Plaintiff's Exhibit No. 29—Defendant's medium circular red Crusader heel",

"Plaintiff's Exhibit No. 30—Defendant's medium circular orange Crusader heel",

"Plaintiff's Exhibit No. 31—Defendant's small circular orange Crusader heel",

"Plaintiff's Exhibit No. 32—Defendant's very small circular plain tan spot Crusader heel",

"Plaintiff's Exhibit No. 33—Defendant's large square yellow Crusader heel",

"Plaintiff's Exhibit No. 34—Defendant's medium circular red Sure Foot heel",

"Plaintiff's Exhibit No. 35—Defendant's large circular red Sure Foot heel",

[fol.65] "Plaintiff's Exhibit No. 36—Defendant's circular tan Evergrip heel",
"Plaintiff's Exhibit No. 37—Defendant's medium circular green Sure Foot heel", and
"Plaintiff's Exhibit No. 38—Defendant's plain Sure Foot heel".

Immediately upon learning of the display and sale by defendant in 1933 of rubber heels bearing a red circular mark as aforesaid, this affiant upon advice of plaintiff's trade mark attorney, wrote a letter on behalf of plaintiff to the defendant on May 5, 1933, calling defendant's attention to plaintiff's red circular trade mark and the long use thereof by plaintiff and to defendant's aforesaid use of a similar red circular mark on rubber heels and requested the defendant to discontinue selling rubber heels bearing such mark. Thereupon plaintiff received from the defendant a letter dated May 9, 1933 which stated that

"Mr. Murphy is out of the city at the present time and upon his return will give this matter his immediate attention. In the meantime our manufacturers have been advised as to the contents of your letter."

Plaintiff then on May 11, 1933 wrote a letter to defendant acknowledging defendant's said letter of May 9, 1933 and subsequently received from the defendant another letter dated May 19, 1933 and signed by E. A. Murphy, Assistant Secretary, acknowledging plaintiff's aforesaid letter of May 5, 1933 and in its said letter of May 19, 1933, defendant stated in part that

"This company of course will not sanction the sale of merchandise which infringes other trademarks and apart from this we desire to maintain friendly relations with your company. After studying your letter very carefully we reached the conclusion that your objection is to the use of the color red. While I am sure that you understand that a trade mark gives no exclusive right to colors, we are entirely agreeable to requesting our manufacturers to use some other color unlike red. We will proceed accordingly upon your reply".

On behalf of the plaintiff I then wrote to the defendant under May 25, 1933 and acknowledged receipt of defendant's letter of May 19, 1933 and after stating that plaintiff felt

[fol. 66] quite sure that defendant under stood that the red Crusader mark mentioned in defendant's letter was the mark complained of and that defendant probably realized that it was an infringement of plaintiff's mark, I then said

"We understand from the last sentence of your letter that upon receipt of our reply you will change the red Crusader mark, and we shall expect you to do this promptly and in such a way that there will be no further possibility of conflict with our mark".

With the above seemingly definite and credible assurance that defendant would not sanction the sale of merchandise which infringed other trade marks and that defendant desired to maintain friendly relations with plaintiff and would request their manufacturer to change the mark, plaintiff understood and believed that defendant intended to and would thereafter avoid any simulation of or resemblance to plaintiff's trade mark. Plaintiff's office copies of its above mentioned letters to the defendant and the original above mentioned letters that plaintiff received from defendant are submitted herewith as and marked "Plaintiff's Exhibit No. 127—Plaintiff's 1933 correspondence with defendant".

Moreover by reason of a proceeding instituted in 1933 by plaintiff in the United States Patent Office to prevent registration of the same trade mark for rubber heels as that used by defendant on its rubber heels and the withdrawal of its application by plaintiff's opponent therein, which opponent was believed by plaintiff to be the manufacturer referred to in defendant's letter of May 19, 1933 aforesaid, plaintiff felt that it had further assurance that the objectionable mark would no longer be used.

The proceeding aforesaid arose as a result of publication in the United States Patent Office Gazette of April 4, 1933 of a trade mark for which application had been made by Essex Rubber Company of Trenton, New Jersey. The mark of said application as indicated in said Patent Office Gazette was a red circular figure with Crusader's head thereon and the Essex Rubber Company sought to register said red circular figure as a trade mark for Rubber Heels, claiming use of the mark since January 18, 1933.

[fol. 67] This opposer, having noted said mark as published in said Gazette, filed opposition to the registration thereof and in accordance with the practice of the Patent

Office an opposition was declared, whereupon the applicant, Essex Rubber Company, withdrew and abandoned its application upon its representation to the Patent Office that the situation had "been adjusted between all interested parties" and that "The applicant, Essex Rubber Company, no longer uses the mark in red". This plaintiff had had no dealings whatsoever with the Essex Rubber Company regarding the mark and therefore concluded that the Essex Rubber Company was in fact the manufacturer referred to in defendant's letter of May 19, 1933 aforesaid to plaintiff, —that Essex Rubber Company was aware of the objections that the plaintiff had made to this defendant,—that it was because of said objections and some representations made by this defendant to Essex Rubber Company in keeping with defendant's aforesaid letter of May 19, 1933 to this plaintiff that Essex Rubber Company had advised the Patent Office that the situation "has been adjusted between all interested parties", and that this defendant was having its manufacturer carry out the defendant's intention as expressed in its aforesaid letter of May 19, 1933 to this plaintiff as well as the suggestions contained in plaintiff's reply of May 25, 1933 thereto.

No notice or information was given to plaintiff of steps taken by the Essex Rubber Company after the opposition was declared by the Patent Office, except through copies of the Examiner of Interference's letters of August 2, 1933 and August 29, 1933, the First Assistant Commissioner's decision of September 27, 1933, the Examiner of Interference's letter of October 4, 1933 and the First Assistant Commissioner's decision of October 16, 1933, but the Examiner of Interference's letters of August 2 and August 29, 1933 indicated that Essex Rubber Company was endeavoring to withdraw its application, without giving the required notice thereof to this plaintiff, the opposer, and moreover the Assistant Commissioner's decision of September 27, 1933 which permitted such withdrawal of the application, recited that Essex Rubber Company had stated that the parties have reached an agreement and that the Essex Rubber Company no longer uses the mark in red and in view of this information contained in these Patent Office letters of August 2 and August 29, 1933 and in said Septem- [fol. 68] ber 27, 1933 decision, plaintiff felt satisfied that the intention expressed in defendant's letter of May 19,

1933 to this plaintiff respecting plaintiff's mark was being carried out not only by this defendant, but also by its manufacturer. A certified copy of the Essex Rubber Company application, above referred to, is submitted herewith as and marked "Plaintiff's Exhibit No. 128—Essex application Ser. No. 334,432", and a certified copy of the proceedings in the said opposition is submitted herewith as and marked "Plaintiff's Exhibit No. 129—Essex Opposition".

In the early part of 1934, however, information came to plaintiff that defendant not only was still continuing to display and sell rubber heels bearing the red circular Crusader mark of the previous correspondence, Plaintiff's Exhibit No. 127, and involved in the opposition with Essex Rubber Company, Plaintiff's Exhibit No. 129, but also was displaying and selling with the said red marked Crusader heels, other rubber heels bearing the same configuration and design of mark in an orange or yellow color, and plaintiff thereupon wrote a letter under date of February 15, 1934 to defendant in which plaintiff called to defendant's attention its correspondence with defendant in May, 1933 and asked for a definite statement from the defendant. To its said letter, plaintiff received a reply dated February 16, 1934 from defendant by J. L. Pickering, Jr., Buyer, which acknowledged receipt of plaintiff's letter of February 15, 1934, asked for a sample of the heel in question and stated that "To the best of our knowledge and belief, we have no insert on our counter that could in any possible way infringe on your trade mark".

In view of this disclaimer by defendant of any insert that could in any possible way infringe on plaintiff's trade mark, and having in mind defendant's representation in the 1933 correspondence that it would discontinue the objectionable mark and also the opposition proceedings, involving the same mark, in which the applicant therein, who was believed to be the manufacturer of the defendant's rubber heels had represented that it no longer used the mark and had thereby prevailed upon the Patent Office to permit withdrawal of its application, plaintiff was reluctant to believe that defendant had no knowledge of what was actually being done in its stores or was deliberately and intentionally disregarding its previous assurance and decided to check up on the heel displays in other stores of defendant to make [fol. 69] sure that the further use of the mark by defendant was not an unintentional and isolated instance, and instruc-

tions were accordingly sent by plaintiff to its salesmen in various sections of the United States to investigate the rubber heel displays in defendant's stores. The reports furnished by these salesmen and heels that they purchased and sent to plaintiff pursuant to these instructions disclosed that defendant was continuing, and in a widespread manner, to display and sell rubber heels with the red circular Crusader mark of the 1933 correspondence (Plaintiff's Exhibit No. 127) and of the opposition (Plaintiff's Exhibit No. 129) and was also displaying, offering for sale and selling therewith heels bearing a mark of the same configuration and design in other colors such as pink, orange and yellow and that it was also displaying, offering for sale and selling therewith rubber heels bearing a tan circular mark with an eagle design impressed thereon and that in the display and sale of its heels it was mixing and associating the heels bearing these other marks with the heels bearing the red circular Crusader mark.

The salesmen who made the above investigations of and purchased heels at defendant's stores are:

William S. Troxel
J. B. Snider
Bartley H. Blakeman
Leo L. Harper
Ervin A. Reister
Charles W. Burton
Gaylord T. Parry
Fred M. Jones
Lewis S. Long
Frederick H. Hirchert
Harley J. Richert
Herman B. McComb
James A. Mogle
James R. Williams
Charles V. Gaumer
Julius C. Bohling
J. G. Osborn
C. Milton Richey
William G. Klein, Sr.

and their investigations included stores of the defendant in many cities in the following States:

Indiana
Iowa
Michigan
Minnesota
Missouri
Nebraska
New Jersey
New York
Ohio
Pennsylvania
Virginia
West Virginia
Wisconsin

[fol. 70] Said salesmen have made affidavits for use in this case and heels that they purchased, except four that

have been submitted in connection with interrogatories as Defendant's heels Nos. 1, 3, 4 and 9 as set out in the affidavits of William S. Troxel, Bartley H. Blakeman, Herman B. McComb and J. B. Snider are submitted in connection with their respective affidavits as Plaintiff's Exhibits Nos. 44 to 53 inclusive and 55 to 87 inclusive, and the heels of these exhibits, together with others purchased in 1934, have for convenience been mounted on a panel, and this panel with the heels thereon is marked and submitted as "Plaintiff's Exhibit No. 130—Defendant's 1934 heels". A photograph of said panel with the heel exhibits thereon is submitted herewith as and marked "Plaintiff's Exhibit No. 131—Photograph of Exhibit No. 130 (Defendant's 1934 heels)".

After completing the above investigation and submitting the results of the investigation to its attorney, plaintiff wrote a letter to the defendant on June 14, 1934 and therein called defendant's attention to the correspondence of May, 1933, reviewed the situation as shown by the correspondence, advised defendant of the investigation that had just been made in their stores, called defendant's attention to the fact that this investigation showed that they were continuing to display and sell rubber heels bearing the red circular mark complained of and plaintiff in said letter of June 14, 1934 demanded that the defendant discontinue immediately the display and sale of rubber heels bearing circular marks in red, pink, orange, yellow or any other colors in which they had been and were using such marks, and account for the damage because of the infringement of plaintiff's rights. To this letter the defendant replied under date of June 18, 1934 by J. L. Pickering, Jr., Buyer and said that defendant

"• • • assumed that this matter was straightened out to your satisfaction some time ago when Essex Rubber changed all of their dies around from the old ones. We understood that this result of a conference with your company.

'Inasmuch as we are purchasing rubber heels from others than Essex, of different designs, there is a possibility that Essex is using up old stock before making up the new number. However, we will write the Essex people to get the exact status of the situation."

[fol. 71] To this letter plaintiff made response to the defendant under date of June 22, 1934 stating that plaintiff considered the letter of June 18th an unsatisfactory and incomplete response to plaintiff's letter of June 14th to the defendant regarding its continued infringement of the trade mark and in its said letter of June 22, 1934, plaintiff stated that

"We have had no dealings or understanding whatsoever with the Essex Rubber Company regarding this matter, although we are advised that they represented to the Patent Office that they had some agreement with us, which, however, we know nothing about. Moreover, regardless of any understanding that you may have had concerning changes that Essex may have proposed to make in their dies, you have continued to display and sell heels bearing the mark complained of after repeated notices from us of our objection.

"Under these circumstances we would like to know if your letter of June 18 is all the response you care to make to our letter of June 14."

Thereafter plaintiff received a letter dated June 25, 1934 from the defendant signed by Mr. J. L. Pickering, Jr. and reading as follows:

"We wired Essex Rubber Co. last week, advising them that you were still complaining the manufacture and sale of the heel, which you claim is an infringement on your copyright. They wired back that they expected to have new dies made within two weeks.

"This is exactly contrary to our understanding with the Essex Rubber Co., inasmuch as it was our impression that this had happened over a month ago.

"We are writing all stores today to discontinue ordering rubber heels from the Essex Rubber Co. until further notice. Please advise if this is satisfactory and in line with your conclusions."

Then under date of July 7, 1934, the defendant again wrote the plaintiff a letter signed by Mr. Pickering and with this letter submitted to plaintiff a copy of a letter dated July 5, 1934 which defendant had received from H. S. Maddock, Receiver of Essex Rubber Company, who in his letter sought to have defendant obtain from this

plaintiff permission for Essex Rubber Company to dis-
[fol. 72] pose of its stock of heels bearing marks that plaintiff had complained of, and the defendant in its accompanying letter of July 7, 1934 to plaintiff said with respect to the Maddock proposition

"* * * we are certainly not interested in purchasing any more of these goods without your sanction. We must advise that if you state that it is all right to sell what remaining stock they have, that it will take from two to three months to clean this up."

H. S. Maddock, Receiver, in his aforesaid letter stated they were following defendant's instructions and withholding shipments to defendant's stores until such time as their new molds were finished which should be within two weeks.

Plaintiff then on July 12, 1934 in a letter of that date to the defendant, in response to its letters of June 25 and July 7, again went into the entire situation of the defendant's infringement of the plaintiff's circular red trade mark, calling defendant's attention to its continued and deliberate infringement for more than a year. In this letter, plaintiff also referred to the opposition (Plaintiff's Exhibit No. 129) and pointed out that in that proceeding in 1933, Essex Rubber Company not only had assured the Patent Office that the matter had been adjusted, which was not true, but had also assured the Patent Office that it (Essex Rubber Company) had discontinued the red mark, which also apparently was not true. In this letter, plaintiff also called defendant's attention to the fact that the plaintiff had used its trade mark for many years on goods valued at many millions of dollars, that these goods had been distributed throughout the country, and that the plaintiff had spent millions of dollars in advertising and educating the public to identify plaintiff's goods by the red mark. Plaintiff further called attention to the deliberate and prolonged infringement of the plaintiff's trade mark after notice and refused to consent to disposal by Essex Rubber Company of its stock. To this letter no response was received from the defendant.

After receipt of the aforesaid July 7, 1934 letter from defendant and plaintiff's reply of July 12, 1934 thereto, it was learned upon further investigation that contrary to defendant's repeated representations to plaintiff that it was discontinuing the red mark as aforesaid, and not-

withstanding plaintiff's refusal to give defendant consent [fol. 73] to be passed on to Essex Rubber Company to dispose of its stock, defendant not only was continuing to display and sell heels with said red mark and the other marks that plaintiff had objected to, but defendant was also displaying and offering for sale rubber heels with another red circular mark which had an Indian head design impressed thereon and that said rubber heels with the red circular Indian head mark were being displayed by defendant mixed and associated with heels bearing the red marks and the various other marks that plaintiff had previously complained of. Rubber heels bearing the red circular figure with Indian head design above referred to have been submitted herein as Plaintiff's Exhibit Nos. 34 and 35. John L. Duncan and Mildred M. Cordier, each of whom purchased a pair of heels bearing said red circular mark with Indian head design from stores of defendant on August 1, 1934 and August 15, 1934, respectively, are furnishing affidavits for use in this case, and one of said heels purchased by said John L. Duncan is submitted with his affidavit as Plaintiff's Exhibit No. 54, and one of said heels purchased by Mildred M. Cordier is submitted with her affidavit as Plaintiff's Exhibit No. 88. Said Mildred M. Cordier also on August 15, 1934 purchased from a store of defendant a pair of rubber heels bearing red circular Crusader marks, one of which said heels is submitted with her affidavit herein as Plaintiff's Exhibit No. 138 and which said heel Exhibit No. 138 and also the above mentioned heels Exhibit Nos. 54 and 88 are included in the panel display, Plaintiff's Exhibit No. 130.

One of the pair of rubber heels bearing the red circular Indian head mark which was purchased by Mildred M. Cordier on August 15, 1934, as aforesaid, and which was paired with Plaintiff's Exhibit No. 88 at the time of purchase, was, upon plaintiff's instructions, applied on a shoe which was worn by Kenneth L. Keene simultaneously with a shoe having one of plaintiff's heels thereon bearing plaintiff's red circular trade mark, and said Kenneth L. Keene has made an affidavit for use herein and said shoes and heels in their worn condition are submitted in his affidavit as Plaintiff's Exhibit No. 126.

One of the pair of rubber heels bearing the red circular Crusader mark which was purchased by Mildred M. Cordier on August 15, 1934, as aforesaid, and which was paired

with Plaintiff's Exhibit No. 138 at the time of purchase, was, upon plaintiff's instructions, applied on a shoe which was worn by Austin Bryan simultaneously with a shoe hav-[fol. 74] ing one of plaintiff's heels thereon bearing plaintiff's red circular trade mark, and said Austin Bryan has made an affidavit for use herein and said shoes and heels in their worn condition are submitted in his affidavit as Plaintiff's Exhibit No. 133.

On August 11, 1934 plaintiff's trade mark attorney, Mr. Eugene M. Giles, gave notice to the defendant that plaintiff was proceeding to bring suit for infringement against defendant and in that notice, the defendant's past objectionable conduct and its further indifference and disregard of plaintiff's trade mark rights as evidenced by its display and sale of heels with the new red circular figure and Indian head design was pointed out.

The defendant replied to our attorney's aforesaid notice in a letter dated August 31, 1934, signed by E. A. Murphy, and plaintiff's attorney replied thereto under date of September 11, 1934 and advised the defendant that steps were being taken in preparation for suit and that the heels bearing the red circular figure with the Indian head would be included therein.

Copies of all the 1934 letters of plaintiff and plaintiff's attorney and the originals of defendant's 1934 letters above referred to and including the copy of the H. S. Maddock, Receiver letter of July 5, 1934 that was furnished to plaintiff by defendant with the latter's letter of July 7, 1934, are submitted herewith as and marked "Plaintiff's Exhibit No. 134—Plaintiff's 1934 correspondence."

Further investigations of defendant's heel displays were made on September 11, 1934 and on November 5, 1934 by said Mildred M. Cordier, whose affidavit is being furnished, as aforesaid, and on September 11, 1934 she purchased from a store of defendant a pair of rubber heels, one of which bore a red circular Crusader mark and the other of which bore an orange circular Crusader mark. One of said heels with the red circular Crusader mark is submitted with her affidavit herein as Plaintiff's Exhibit No. 89 and one of said heels with the orange circular Crusader mark is submitted with her affidavit herein as Plaintiff's Exhibit No. 90. On November 5, 1934 said Mildred M. Cordier purchased from a store of defendants a pair of rubber heels bearing a square yellow mark with Crusader head thereon, one of which said

heels is submitted with her affidavit herein as Plaintiff's [fol. 75] Exhibit No. 91, and together with said Exhibits 89 and 90 is included in the panel display, Plaintiff's Exhibit No. 130. Said heels with said square yellow marks that said Mildred M. Cordier purchased on November 5, 1934, as aforesaid, were, as this affiant understands, displayed and sold at the same place and associated and mixed together with rubber heels bearing red circular Crusader marks, as well as marks of other colors.

The bill of complaint was prepared and filed, as affiant is advised, on November 28, 1934 and thereafter plaintiff received a letter dated January 2, 1935 from Harold S. Maddock, Receiver of Essex Rubber Company regarding the suit that had been instituted against this defendant by the filing of said bill of complaint and to that letter of Harold S. Maddock, Receiver, plaintiff replied in a letter under date January 18, 1935, copy of which said letter of January 18, 1935 and the original of said Essex Rubber Company letter of January 2, 1935 are submitted herewith as and marked "Plaintiff's Exhibit No. 135—Essex 1935 correspondence."

Defendant answered said bill of complaint and as affiant is advised, denied that it had committed the acts of infringement and unfair competition alleged in the bill of complaint. Thereafter, believing that defendant well knew of the marks that it had been using on its rubber heels and the manner in which it had displayed said heels in its various stores and believing further that the facts with respect thereto could be elicited by the filing of interrogatories directed to defendant, plaintiff filed interrogatories which were answered by defendant on February 28, 1935. With said interrogatories, plaintiff filed nine rubber heels marked respectively, Defendant's heels Nos. 1 to 9 inclusive which bore the following marks, namely, red circular Crusader mark, orange circular Crusader mark, plain tan spot Crusader mark, square yellow Crusader mark, a red circular Indian head (Sure Foot) mark and tan circular Eagle (Evergrip) mark, and plaintiff in its interrogatory No. 11 asked defendant to "state whether or not Defendant associated or mixed together said heels in displaying and offering them for sale" to which defendant answered:

"To the best of our knowledge, no. It would not be our normal way of selling this merchandise."

[fol. 76] and plaintiff in its interrogatory No. 12 asked defendant "If the answer to Interrogatory No. 11 is in the affirmative, state which of said rubber heels were associated or mixed together" to which defendant answered:

"To the best of our knowledge, the rubber heels of various kinds and manufacture were never associated or mixed together. It would not be our normal way of selling this merchandise."

Plaintiff believing that defendant, notwithstanding its aforesaid answers to said interrogatories, was actually in the display and sale thereof associating and mixing its rubber heels bearing the marks of the said interrogatory heels, not only in various places throughout the United States, but also in defendant's immediate vicinity in the Eastern District of Michigan, Southern Division and in the City of Detroit in said Division, made an investigation with respect thereto in various places throughout the United States and in the City of Detroit and elsewhere in the said Eastern District, and ascertained that defendant, contrary to its knowledge and belief as indicated in its answers to said interrogatories and although stating in said answers that it was not its policy to do so, was in fact in many places and even in its immediate vicinity associating and mixing its rubber heels bearing the marks of the interrogatory heels and defendant was also associating and mixing with the aforesaid heels other heels bearing a green mark of the same configuration and design as the red mark of the heels that were submitted with the interrogatories as Defendant's heels Nos. 7 and 8.

In this investigation a number of plaintiff's salesmen were instructed by plaintiff to examine the heel displays in stores of defendant and reports were made and heels purchased by the following salesmen:

James R. Williams
Charles V. Gaumer
Julius C. Bohling
J. G. Osborn
C. Milton Richey
William G. Klein, Sr.
Francis J. Corr
C. Wray Campbell

[fol. 77] who visited stores of the defendant in the following States:

Indiana
Kentucky
Nebraska
New York
Ohio
Pennsylvania
Virginia
West Virginia

Affidavits have been made by these salesmen for use in this case and the heels that they purchased are submitted with their affidavits as Plaintiff's Exhibit Nos. 92 to 113, inclusive, and 123, 124 and 125. The above mentioned Mildred M. Cordier also examined heel displays in several stores of the defendant and purchased heels at that time which are submitted with her affidavit herein as Plaintiff's Exhibits Nos. 114 to 122 inclusive. For convenience, the heels purchased by these salesmen and by Mildred M. Courier as aforesaid, and designated as Exhibits Nos. 92 to 125 inclusive have been mounted on a panel, and this panel with said heel Exhibits 92 to 125 inclusive thereon is marked and submitted as "Plaintiff's Exhibit No. 136—Defendant's 1935 heels". A photograph of said panel with said heel exhibits thereon is submitted herewith as and marked "Plaintiff's Exhibit No. 137—Photograph of Exhibit No. 136 (Defendant's 1935 heels)".

Also in the above mentioned investigation, George Washington, Jr. and Manning Giles were sent to Detroit, Ann Arbor, Jackson, Dearborn, Pontiac, Battle Creek and Lansing, all in the Eastern District of Michigan, Southern Division, to examine and make records of the heel displays in defendant's stores in those places. During April 10 to 13 inclusive of 1935 they visited twenty-four stores of defendant in Detroit, one in Ann Arbor, one in Jackson, one in Dearborn, one in Pontiac, two in Battle Creek and two in Lansing, and made a record of the heel displays in each of said stores. Affidavits have been made by said Washington and Giles for use in this case and in connection with the Washington affidavit thirty-two charts showing the heel displays in all of the aforesaid stores visited by said Washington and Giles are submitted as Plaintiff's Exhibit No.

132. Replicas of the displays in the stores of defendant at [fol. 78] 1201 Woodward Avenue, 5505 Michigan Avenue and 9201 Mack Avenue, all in the City of Detroit, were also made and have been submitted in connection with the Washington affidavit as Plaintiff's Exhibits Nos. 139, 140 and 141 respectively and for convenience, photographs of said replicas have been made and are submitted herewith as and marked respectively, "Plaintiff's Exhibit No. 142—Photograph of Exhibit No. 139 (1201 Woodward Ave., Detroit)". "Plaintiff's Exhibit No. 143—Photograph of Exhibit No. 140 (5505 Michigan Ave., Detroit)". and "Plaintiff's Exhibit No. 144—Photograph of Exhibit No. 141 (9201 Mack Ave., Detroit)".

Plaintiff, being convinced that defendant had not intended to and did not intend to discontinue the use of said marks on its heels nor the mixing and associating of heels bearing the various said marks nor the use of the peculiar ensemble of a spot of contrasting color on the tread face of its heels unless and until compelled to do so by order of Court, on March 19, 1935 sent an attorney to Detroit to investigate the prospects of an early trial and having learned from said investigation that it is unlikely that this cause in its regular order will be reached for trial for many months, plaintiff thereupon had its attorney proceed with preparations to present a motion for preliminary injunction to restrain defendant from continuing the acts complained of in the bill of complaint. Plaintiff has been informed and understands that defendant has 687 stores in the United States and 47 stores in the Dominion of Canada in which it is believed to have been and is believed to be committing the acts complained of in the bill of complaint and it is believed that said acts have been and are causing a very great amount of damage to plaintiff and that unless restrained by preliminary injunction, defendant will continue to commit the acts complained of and will thereby cause plaintiff further very great and irreparable damage.

This affidavit is made by me to be used on a motion for preliminary injunction about to be presented in the above entitled case by Mishawaka Rubber and Woolen Manufacturing Company, plaintiff against S. S. Kresge Company, defendant.

. . . . . .

[fol. 79] AFFIDAVIT OF CHARLES V. GAUMER

* * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1909.

Having received a request from the plaintiff to do so I went into the store of the defendant at 324 W. Main Street in Clarksburg in the County of Harrison and State of West Virginia, on February 24, 1934, and there purchased from [fol. 80] a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant two pairs of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 74—Defendant's medium circular red Crusader heel bought by Gaumer in West Virginia".

* * * * * * *

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 75—Defendant's large circular orange Crusader heel bought by Gaumer in West Virginia".

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in both the red and the orange colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

On March 8, 1935 at the request of the plaintiff, I again visited the store of the defendant which I had visited on February 24, 1934 at 324 W. Main Street, Clarksburg, West Virginia, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant five pairs of rubber heels, two pairs being of the "Crusader" type and three pairs being of the "Sure Foot" type.

* * * * * * *

[fol. 81] I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 97—Defendant's large circular orange Crusader heel bought by Gaumer in West Virginia March 8, 1935".

* * * * * * *

I submit herewith one of these heels with the red colored circular "Crusader" mark as "Plaintiff's Exhibit No. 98—Defendant's small circular red Crusader heel bought by Gaumer in West Virginia March 8, 1935".

* * * * * * *

I submit herewith one of these heels with the red colored circular "Sure Foot" mark as "Plaintiff's Exhibit No. 99—Defendant's large circular red Sure Foot heel bought by Gaumer in West Virginia March 8, 1935."

* * * * * * *

I submit herewith one of these heels with the green colored circular "Sure Foot" mark as "Plaintiff's Exhibit No. 100—Defendant's large green circular Sure Foot heel bought by Gaumer in West Virginia March 8, 1935".

* * * * * * *

[fol. 82] I submit herewith one of these heels with the green circular "Sure Foot" mark as "Plaintiff's Exhibit No. 101—Defendant's medium circular green Sure Foot heel bought by Gaumer in West Virginia March 8, 1935".

The rubber heels in said store were displayed March 8, 1935 on a counter having a certain part thereof devoted to the display of rubber heels and in this heel display rubber heels bearing the aforesaid circular marks in the red color, the orange color and the green color were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

* * * * * * *

[fols. 83-84] AFFIDAVIT OF MANNING GILES

* * * * * * *

(The affiant, an employee in the office of E. M. Giles, counsel for the plaintiff, fully corroborated the statements contained in the affidavit of George Washington, Jr.)

. . . . . .

[fol. 85] AFFIDAVIT OF LEO L. HARPER

. . . . . .

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1928.

Having received a request from the plaintiff to do so I went into the store of the defendant at 7th and Nicollet Streets, in Minneapolis, in the County of Hennepin and State of Minnesota, on February 24, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant two pairs of rubber heels, one of the "Crusader" type and the other of the "Evergrip" type.

. . . . . .

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 47—Defendant's medium circular orange Crusader heel bought by Harper in Minneapolis, Minnesota."

. . . . . .

[fol. 86] I submit herewith one of these "Evergrip" heels with the tan colored circular mark as "Plaintiff's Exhibit No. 48—Defendant's circular tan Evergrip heel bought by Harper in Minneapolis, Minnesota".

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular mark in both the orange and the tan colors were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

. . . . . .

I went into the store of the defendant at No. 59 E. 7th Street in St. Paul, in the County of Ramsey in said State

on March 1, 1934 and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant one pair of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these rubber heels with the red circular colored mark as "Plaintiff's Exhibit No. 49—Defendant's small circular red Crusader heel bought by Harper in St. Paul, Minnesota".

[fol. 87] The rubber heels in said store in St. Paul were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks of the "Crusader" type of heels in both the red and the orange colors were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

* * * * * * *

[fol. 88] AFFIDAVIT OF FREDERICK H. HIRCHERT

* * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1922.

Having received a request from the plaintiff to do so I went into the store of the defendant at 402 Euclid Avenue in Cleveland, in the County of Cuyahoga and State of Ohio, on February 28, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant three pairs of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels as "Plaintiff's Exhibit No. 62—Defendant's large circular orange Crusader heel bought by Hirchert in Cleveland, Ohio".

* * * * * * *

[fol. 89] I submit herewith one of each of these heels with the red circular marks as "Plaintiff's Exhibit No. 63—

Defendant's small circular red Crusader heel (Black) bought by Hirchert in Cleveland, Ohio". I also submit herewith one of the other pair of rubber heels as "Plaintiff's Exhibit No. 64—Defendant's small circular red Crusader heel (Brown) bought by Hirchert in Cleveland, Ohio".

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in both the orange and the red colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

. . . . . .

[fol. 90] AFFIDAVIT OF FRED M. JONES

. . . . . .

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1926.

Having received a request from the plaintiff to do so I went into the store of the defendant at 1423 N. 12th Street in Milwaukee, in the County of Milwaukee and State of Wisconsin, on March 5, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant two pairs of rubber heels of the "Crusader" type.

. . . . . .

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 59—Defendant's large circular orange Crusader heel bought by Jones in Wisconsin."

. . . . . .

I submit herewith one of these heels as "Plaintiff's Exhibit No. 60—Defendant's very small circular plain tan spot Crusader heel bought by Jones in Wisconsin".

[fol. 91] The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in both the orange and the tan colors, were indiscriminately displayed

together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

* * * * * * *

[fol. 92] AFFIDAVIT OF KENNETH L. KEENE

* * * * * * *

I am employed by the plaintiff in the above entitled case and have been in its employ since October 19, 1925.

In August, 1934 I was requested by Mildred M. Cordier, another of the employees of the plaintiff to wear a pair of leather shoes with two rubber heels attached thereto for the purpose of making a wear test of said rubber heels, and particularly to ascertain the wear results on two different red circular marks which were located in the central portion of the tread faces of the heels.

One of said rubber heels that were attached on one of the shoes of the pair furnished to me at that time, was a new rubber heel manufactured by the plaintiff and had plaintiff's red circular trade mark thereon with the words "Trade Mark" embossed on said red circular trade mark, the word "Trade" being above the word "Mark". Said rubber heel and its mark were identical with the rubber heel and its mark submitted in this case as "Plaintiff's Exhibit No. 16—Plaintiff's rubber heel". The other of said rubber heels that was attached to the other shoe of the pair furnished to me at that time, was a new rubber heel which was marked "Sure Foot" and had a red circular mark with the figure of an indian head embossed thereon. The last named rubber heel and its mark were identical with the rubber heel and its mark submitted in this case as "Plaintiff's Exhibit No. 35—Defendant's large circular red Sure Foot heel". Miss Cordier told me that the last named rubber heel was one of a pair of rubber heels which she had purchased in a store of the defendant [fol. 93] in South Bend, Indiana a few days before I began the wear test. I understand that Miss Cordier had made an affidavit in this case and that she has submitted the other rubber heel of the pair of "Sure Foot" heels she bought in defendant's store as "Plaintiff's Exhibit No. 88—Defendant's large circular red Sure Foot heel bought by Mildred M. Cordier in South Bend, Indiana".

Prior to beginning the wear test an identifying description was placed on the inside of the "Sure Foot" heel. In addition to this two holes were punched in the leather tongue of the shoe on which the "Sure Foot" heel was attached for means of identification.

On August 21, 1934 I started wearing the said pair of shoes which were provided with one of the plaintiff's rubber heels and with one of the "Sure Foot" type of rubber heels as aforesaid, and I continued wearing these shoes almost daily until December 13, 1934. At various times during this period, Miss Cordier and I examined the heels of said shoes and the marks on the heels, and finally when the heels had become somewhat worn down, the wear test was discontinued on December 13, 1934, at which time I delivered said shoes with the rubber heels attached thereto to plaintiff. At the completion of said wear test on December 13, 1934 the superficial markings on the tread face of plaintiff's rubber heel had been almost completely worn away, while the round red trade mark remained, and on the "Sure Foot" rubber heel the words "Sure Foot" were becoming dim and indistinct, and the indian head embossing was partially worn away on the red mark which still remained, and the red marks on both of said heels appeared conspicuously on the respective heels, although both heels and marks showed considerable wear. Although the two heels were worn by me simultaneously and for the same identical length of time, the "Sure Foot" heels showed more effects of wear than the plaintiff's heel.

I submit herewith the pair of shoes with the heels hereinbefore referred to made by the plaintiff and of the "Sure Foot" type as "Plaintiff's Exhibit No. 126—Pair of shoes bearing plaintiff's and Sure Foot type circular red marks worn by Keene".

* * * * * * *

[fol. 94] AFFIDAVIT OF WILLIAM G. KLEIN

* * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1915.

Having received a request from the plaintiff to do so I went into the store of the defendant at 17-23 W. Washington Street in Indianapolis in the County of Marion and

State of Indiana, on February 28, 1934, and there pur-
[fol. 95] chased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant two pairs of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 86—Defendant's small circular red Crusader heel bought by Klein, Sr. in Indianapolis, Indiana".

* * * * * * *

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 87—Defendant's large circular orange Crusader heel bought by Klein, Sr. in Indianapolis, Indiana".

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks in both the red and the orange colors were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

On March 16, 1935 at the request of the plaintiff, I again visited the store of the defendant which I had visited on February 28, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant two pairs of rubber heels of the "Sure Foot" type.

* * * * * * *

[fols. 96-97] I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 112—Defendant's large circular red Sure Foot heel bought by Klein, Sr. in Indianapolis, Indiana March 16, 1935".

* * * * * * *

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 113—Defendant's medium circular red Sure Foot heel bought by Klein, Sr. in Indianapolis, Indiana March 16, 1935".

In the same display of rubber heels from which I purchased the two pairs of "Sure Foot" rubber heels, Plaintiff's Exhibit No. 112 and Plaintiff's Exhibit No. 113 employing the red circular marks, there were mixed therewith a number of rubber heels of the "Sure Foot" type which had no marks bearing color but were plain like "Plaintiff's Exhibit No. 38—Defendant's plain Sure Foot heel".

When purchasing the two pairs of "Sure Foot" red circular marked rubber heels I asked the young lady in charge of the counter in the Kresge store aforesaid, on March 16, 1935, if they sold many of these heels bearing the red circular marks. She said they did and especially the kind I had in my hand, indicating Plaintiff's Exhibit No. 112 and Plaintiff's Exhibit No. 113. She said that these were the kind most people purchased, although she showed me a plain black "Sure Foot" heel without color.

* * * * * * *

[fols. 98-99] AFFIDAVIT OF VERNICE F. LUDWIG

* * * * * * *

(The affiant, plaintiff's manager of sales, fully corroborated the statements contained in the affidavit of Earle J. W. Fink.)

* * * * * * *

[fol. 100] AFFIDAVIT OF JAMES A. MOGLE

* * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1926.

Having received a request from the plaintiff to do so I went into the store of the defendant at 1449 Woodward Avenue in Detroit, in the County of Wayne and State of [fol. 101] Michigan, on February 26, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant one pair of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels which I purchased on February 26, 1934 as "Plaintiff's Exhibit No. 69—

Defendant's large circular orange Crusader heel bought by Mogle in Detroit, Michigan".

Having received a request from the plaintiff to do so I went into the store of the defendant at 1201 Woodward Avenue in Detroit, in said County and State, on March 14, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant two pairs of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels which I purchased on March 14, 1934 as "Plaintiff's Exhibit No. 70—Defendant's small circular red Crusader heel bought by Mogle in Detroit, Michigan".

* * * * * * *

I submit herewith one of these heels which I purchased on March 14, 1934 as "Plaintiff's Exhibit No. 71—Defendant's very small circular plain tan spot Crusader heel bought by Mogle in Detroit, Michigan".

The rubber heels in said stores were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bear-
[fol. 102] ing the aforesaid circular marks, in both the red and the tan colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

In April, 1935 I was advised by plaintiff that two investigators, namely George Washington, Jr. and Manning Giles were being sent to Detroit to visit stores of the defendant in Detroit and examine and make records of the heel displays in said stores and I was requested by plaintiff to go with these investigators into some of defendant's stores, including the two that I had visited as aforesaid in 1934 and to check the heel displays in said stores with the investigators.

On April 11, 1935, I accompanied these investigators to the stores of the defendant at 1201 Woodward Avenue and 1449 Woodward Avenue, Detroit, in which stores I had previously made rubber heel purchases, as hereinbefore stated. I examined the rubber heel displays in both these

stores, checked them carefully and found them to be as represented respectively in the two colored diagrams on pages 1 and 10 of Plaintiff's Exhibit No. 138, which said pages are marked respectively "1201 Woodward Avenue, Detroit" and "1449 Woodward Avenue, Detroit".

On April 11, 1935, I also visited the defendant's stores at 5505 Michigan Avenue, Detroit and 9201 Mack Avenue, Detroit with said investigators and I examined the rubber heel displays in both these two last mentioned stores. I checked them carefully and found them to be as represented respectively on the two colored diagrams on pages 2 and 3 of Plaintiff's Exhibit No. 138, which said pages are marked respectively "5505 Michigan Avenue, Detroit" and "9201 Mack Avenue, Detroit".

Three photographs have been submitted to me which I understand are photographs of replicas of the heel displays that I saw and examined with said George Washington, Jr. and Manning Giles on April 11, 1935 at three of defendant's aforesaid stores. One of said photographs, which is marked "Plaintiff's Exhibit No. 142—Photograph of Exhibit No. 139 (1201 Woodward Ave., Detroit)" shows rubber heels arranged in the manner and with marks thereon as I saw them arranged, displayed and marked on April 11, 1935 at defendant's store at 1201 Woodward Avenue, Detroit, Michigan, and another of said photographs which is marked [fol. 103] "Plaintiff's Exhibit No. 143—Photograph of Exhibit No. 140 (5505 Michigan Ave., Detroit)" shows rubber heels arranged in the manner and with marks thereon as I saw them arranged, displayed and marked on April 11, 1935 at defendant's store at 5505 Michigan Avenue, Detroit, Michigan, and the third of said protographs, which is marked "Plaintiff's Exhibit No. 144—Photograph of Exhibit No. 141—(9201 Mack Ave., Detroit)" shows rubber heels arranged in the manner and with marks thereon as I saw them arranged, displayed and marked on April 11, 1934 at defendant's store at 9201 Mack Avenue, Detroit, Michigan.

* * * * * * *

[fol. 104] AFFIDAVIT OF J. G. OSBORN

* * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1916.

Having received a request from the plaintiff to do so I went into the store of the defendant at 302-304 Pearl Street in New Albany, in the County of Floyd and State of Indiana, on March 16, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant two pairs of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 79—Defendant's medium circular red Crusader heel bought by Osborn in New Albany, Indiana".

* * * * * * *

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 80—Defendant's medium circular orange Crusader heel bought by Osborn in New Albany, Indiana".

[fol. 105] The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in both the red and the orange colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

On March 9, 1935 at the request of the plaintiff, I visited another store of the defendant at 412-418 S. 4th Street in Louisville, in the County of Jefferson and State of Kentucky, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant three pairs of rubber heels, one pair being of the "Crusader" type and the other two pairs being of the "Sure Foot" type.

* * * * * * *

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 106—Defendant's large circular orange Crusader heel bought by Osborn in Louisville, Kentucky March 9, 1935".

* * * * * * *

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 107—Defendant's large circular red Sure Foot heel bought by Osborn in Louisville, Kentucky March 9, 1935".

. . . . . .

[fol. 106] I submit herewith one of these heels with the green colored circular "Sure Foot" mark as "Plaintiff's Exhibit No. 108—Defendant's medium circular green Sure Foot heel bought by Osborn in Louisville, Kentucky March 9, 1935".

The rubber heels in said store were displayed March 9, 1935 on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks in the orange color, the red color and the green color were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

. . . . . .

[fol. 107] AFFIDAVIT OF GAYLORD T. PARRY

. . . . . .

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1904.

Having received a request from the plaintiff to do so I went into a store of the defendant in Dubuque in the County of Dubuque and State of Iowa, on February 26, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant three pairs of rubber heels of the "Crusader" type and one pair of the "Evergrip" type.

. . . . . .

I submit herewith one of each of these heels with the orange circular mark as "Plaintiff's Exhibit No. 55—Defendant's large circular orange Crusader heel (Black) bought by Parry in Iowa". I also submit herewith one of the other pair of rubber heels as "Plaintiff's Exhibit No. 56—Defendant's large circular orange Crusader heel (Brown) bought by Parry in Iowa".

The third pair of "Crusader" rubber heels purchased by me February 26, 1934 was a pair of rubber heels having

[fols. 108-109] an all orange circular mark identical with the mark in "Plaintiff's Exhibit No. 31—Defendant's small circular orange Crusader heel" and the same is marked "Plaintiff's Exhibit No. 57—Defendant's small circular orange Crusader heel bought by Parry in Iowa".

* * * * * * * *

I submit herewith one of these heels with the tan circular mark as "Plaintiff's Exhibit No. 58—Defendant's circular tan Evergrip heel bought by Parry in Iowa".

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks in the orange and in the tan colors were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

* * * * * * *

[fol. 110] AFFIDAVIT OF C. MILTON RICHEY

* * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1932 and was previously in their employ from 1920 to 1922.

Having received a request from the plaintiff to do so I went into the store of the defendant in Richmond, in the County of Wayne and State of Indiana, on February 26, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant one pair of rubber heels of the "Crusader" type.

* * * * * * *

[fol. 111] I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 81—Defendant's medium circular red Crusader heel bought by Richey in Richmond, Indiana."

In the same store in Richmond, Indiana on February 26, 1934 I also saw other rubber heels of the "Crusader" type having orange circular marks identical with the red circular marks of Plaintiff's Exhibit 81. These orange circular marks were similar to the marks in "Plaintiff's Exhibit No.

30—Defendant's medium circular orange Crusader heel."

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in both the red and the orange colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

Having received a request from the plaintiff to do so I also went into the store of the defendant at 85 No. High street in Columbus, in the County of Franklin and State of Ohio, on February 26, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant one pair of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 82—Defendant's medium circular red Crusader heel bought by Richey in Columbus, Ohio."

In the same store in Columbus, Ohio, on February 26, 1934, I also saw other rubber heels of the "Crusader" type having orange circular marks identical with the red circular [fol. 112] marks of Plaintiff's Exhibit 82. These orange circular marks were similar to the mark in "Plaintiff's Exhibit No. 30—Defendant's medium circular orange Crusader heel."

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in both the red and the orange colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

Having received a request from the plaintiff to do so I also went into the store of the defendant at 85 So. High street in Columbus, Ohio, on February 26, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant one pair of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 83—Defendant's large circular orange Crusader heel bought by Richey in Columbus, Ohio."

In the same store in Columbus, Ohio, on February 26, 1934, I also saw other rubber heels of the "Crusader" type having red circular marks identical with the orange circular marks of Plaintiff's Exhibit No. 83. These red circular marks were similar to the mark in "Plaintiff's Exhibit No. 29—Defendant's medium circular red Crusader heel."

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in both the orange and the red colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

[fol. 113] On February 26, 1934, I also visited, at the request of the plaintiff, the store of the defendant at 25-27 Main street in Springfield, in the County of Clark and State of Ohio, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant one pair of rubber heels of the "Crusader" type.

* * * * * * * *

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 84—Defendant's large circular orange Crusader heel bought by Richey in Springfield, Ohio."

Having received a request from the plaintiff to do so I went into the store of the defendant in Bloomington, in the County of Monroe and State of Indiana, on February 28, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant one pair of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 85—Defendant's small circular red Crusader heel bought by Richey in Bloomington, Indiana."

In the same store in Bloomington, Indiana, on February 28, 1934, I also saw other rubber heels of the "Crusader" type having orange circular marks identical with the red circular mark of Plaintiff's Exhibit No. 85. These orange circular marks were similar to the marks in "Plaintiff's Exhibit No. 30—Defendant's medium circular orange Crusader heel."

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing [fol. 114] the aforesaid circular marks, in both the red and the orange colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

On March 29, 1935, at the request of the plaintiff, I again visited the store of the defendant which I had visited on February 26, 1934, at 85 So. High street, Columbus, Ohio, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant three pairs of rubber heels, one pair being of the "Crusader" type and two pairs being of the "Sure Foot" type.

* * * * * * *

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 109—Defendant's medium circular orange Crusader heel bought by Richey in Columbus, Ohio, March 29, 1935."

* * * * * * *

I submit herewith one of these heels with the red colored circular "Sure Foot" mark as "Plaintiff's Exhibit No. 110—Defendant's medium circular red Sure Foot heel bought by Richey in Columbus, Ohio, March 29, 1935."

* * * * * * *

I submit herewith one of these heels with the "Sure Foot" mark without color as "Plaintiff's Exhibit No. 111—Defendant's plain Sure Foot heel bought by Richey in Columbus, Ohio, March 29, 1935."

[fol. 115] The rubber heels in said store were displayed March 29, 1935, on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel dis-

play rubber heels bearing the aforesaid circular marks in the orange and the red colors, as well as no color, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

* * * * * * *

[fol. 116] AFFIDAVIT OF HARLEY J. RICKERT

* * * * * * *

I am a salesman in the employ of the plaintiff, and have been in its employ since the year 1913.

Having received a request from the plaintiff to do so I went into the store of the defendant at 324 5th avenue in Pittsburgh, in the County of Allegheny and State of Pennsylvania, on March 10, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant three pairs of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels as "Plaintiff's Exhibit No. 65—Defendant's large circular red Crusader heel bought by Rickert in Pittsburgh, Pa."

* * * * * * *

I submit herewith one of these heels as "Plaintiff's Exhibit No. 66—Defendant's small circular red Crusader heel bought by Rickert in Pittsburgh, Pa."

* * * * * * *

[fol. 117] I submit herewith one of these heels with the orange circular mark as "Plaintiff's Exhibit No. 67—Defendant's large circular orange Crusader heel bought by Rickert in Pittsbugh, Pa."

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in both the red and the orange colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

* * * * * * *

[fol. 118] AFFIDAVIT OF J. B. SNIDER

* * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1933.

Having received a request from the plaintiff to do so I went into a store of the defendant in St. Louis, in the County of St. Louis and State of Missouri, on March 5, 1934, and there purchased from a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant three pairs of rubber heels, two pairs being of the "Crusader" type and one of the "Evergrip" type.

* * * * * * *

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 45—Defendant's medium circular red Crusader heel bought by Snider in Missouri".

* * * * * * *

[fol. 119] I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 46—Defendant's large orange Crusader heel bought by Snider in Missouri".

* * * * * * *

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in the red, in the orange and in the tan colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

* * * * * * *

[fol. 120] AFFIDAVIT OF WILLIAM S. TROXEL

* * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1916.

Having received a request from the plaintiff to do so I went into the store of the defendant at 245 Main Street in Orange, in the County of Essex and State of New Jersey, on February 26, 1934, and there purchased from a salesperson of the defendant engaged in the sale of rubber heels at one of the counters of the defendant two pairs of rubber heels of the "Crusader" type.

* * * * * * *

The rubber heels of the other pair purchased by me February 26, 1934 had a mark identical with the red circular mark aforesaid, except that the color of the mark was orange instead of red.

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 44—Defendant's large orange heel bought by Troxel in New Jersey". [fol. 121] The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular mark, in both the red and the orange colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

* * * * * * *

AFFIDAVIT OF GEORGE WASHINGTON, JR.

* * * * * * *

I am of mature age, am a resident of Western Springs, in the County of Cook and State of Illinois, and am employed with my father in business.

[fol. 122] At the request of Mr. E. M. Giles, counsel for the plaintiff in the above entitled cause, I went to Detroit, Ann Arbor, Jackson, Dearborn, Pontiac, Battle Creek and Lansing, all in the State of Michigan and all in the Eastern District of Michigan, Southern Division, to visit stores of the defendant, S. S. Kresge Company at these places and to investigate the displays of rubber heels in said stores, the marks that were being used on said rubber heels and the manner in which the rubber heels were being displayed, and in visiting said stores I was accompanied by Mr. Manning Giles, also of Western Springs, Illinois. We visited and examined heel displays on April 10, 11 and 12, 1935 at defendant's stores in Detroit, Michigan, and on April

10, 1935 we also visited and examined heel displays at defendant's stores in Jackson, Michigan and Dearborn, Michigan, and on April 13, 1935, we visited and examined heel displays at defendant's stores at Ann Arbor, Pontiac, Lansing and Battle Creek, all in the State of Michigan, and we purchased rubber heels in most of these various stores of defendant that we visited. The addresses of defendant's stores that we visited and in which we examined heel displays, as aforesaid, during April 10-13, 1935 and in most of which said stores we purchased rubber heels are:

1201 Woodward Avenue—Detroit, Michigan
5505 Michigan Avenue—Detroit, Michigan
9201 Mack Avenue—Detroit, Michigan
5656 W. Vernor Highway—Detroit, Michigan
9542 Joseph Campau, Hamtramck—Detroit, Michigan
9012 Grand River—Detroit, Michigan
64 Saginaw Street, Pontiac, Michigan
11226 E. Jefferson, Detroit, Michigan
9615 Gratiot—Detroit, Michigan
1449 Woodward Avenue—Detroit, Michigan
8713 Twelfth Street—Detroit, Michigan
7348 Grand River—Detroit, Michigan
7821 W. Vernor Highway—Detroit, Michigan
114 S. Washington Street—Lansing, Michigan
21720 Grand River—Detroit, Michigan
204 S. Main Street—Ann Arbor, Michigan
55-61 Michigan Avenue W.—Battle Creek, Michigan
6547 Woodward Avenue—Detroit, Michigan
13933 Woodward Avenue—Detroit, Michigan
1461 Gratiot—Detroit, Michigan
[fol. 123] 10786 Grand River—Detroit, Michigan
14297 Gratiot—Detroit, Michigan
5892 W. Fort Street—Detroit, Michigan
13040 E. Jefferson—Detroit, Michigan
15328 Livernois—Detroit, Michigan
8021 Harper—Detroit, Michigan
37 Michigan Ave., W.—Battle Creek, Michigan
216 S. Washington—Lansing, Michigan
7354 Grand River—Detroit, Michigan
11634 Dexter—Detroit, Michigan
22022 Michigan Avenue—Dearborn, Michigan
133-135 Michigan Avenue—Jackson, Michigan

In each of the various stores of the defendant which we visited as aforesaid, the rubber heels were displayed on a counter which had a certain part thereof devoted to the display of rubber heels and the rubber heels, except in the store at 11634 Dexter Street, Detroit, were arranged throughout the counter space devoted thereto, in adjoining stacks with the number of heels in the stacks varying in the different stores and oftentimes in the stacks in the same store, and with the top heels of the stacks arranged with their tread faces upward and exposing to view the trade marks thereon. In some cases, rubber heels were arranged on edge between some of the stacks. In the store at 11634 Dexter Street, there was no counter display of heels, the heels being merely piled in a box which was produced for heel customers.

The heels that we found on display in the defendant's stores aforesaid, with their tread faces and the trade marks exposed were of various sizes and some of said heels were made of black rubber and others of brown rubber and said heels had a number of different trade marks of different colors, shapes and sizes in the central portions of their tread faces. A large number of the heels in said displays had red circular marks thereon which varied in size according to the size of the heel, and some of said red circular marks were of the "Crusader" type like those appearing on Plaintiff's Exhibits Nos. 28 and 29 and others of said red circular marks were of the "Sure Foot" type like those appearing on Plaintiff's Exhibits Nos. 34 and 35. Many others of said heels had orange circular marks of the "Crusader" type like those appearing on Plaintiff's Exhibits Nos. 30 and 31, and some of said heels had plain tan spot marks like that appearing on [fol. 124] the "Crusader" heel, Plaintiff's Exhibit No. 32. Others of the heels displayed in defendant's aforesaid stores bore a square yellow mark of the "Crusader" type like that appearing on Plaintiff's Exhibit No. 33, while others bore a tan circular mark of the "Evergrip" type like that appearing on Plaintiff's Exhibit No. 36, and others had a green circular mark of the "Sure Foot" type like that appearing on Plaintiff's Exhibit No. 37, and still others had an indian head mark of the same color as the rubber of the heel and like the mark appearing on Plaintiff's Exhibit No. 38.

In the heel displays of all of the defendant's said stores, and in the box at 11634 Dexter Street, Detroit, the rubber heels bearing the aforesaid marks above mentioned of various colors and shapes like those on Plaintiff's Exhibits Nos. 28 to 38 inclusive were indiscriminately mixed together and associated. A colored chart or diagram of each heel display that we examined in defendant's above mentioned stores has been prepared which said chart or diagram, except in two instances, hereinafter mentioned, shows the arrangement of the exposed top heels in the respective stores and the marks that appeared on said heels at the time we examined the heel display that is represented in each chart or diagram. Each chart or diagram is marked with the address of the store where we examined the heel display represented by the chart or diagram and is also marked with the date of our visit to that store and these charts or diagrams, (thirty-two in number) have been bound together as a single exhibit, which is submitted herewith as "Plaintiff's Exhibit No. 132—Colored diagrams showing defendant's rubber heel displays in Detroit and vicinity".

The defendant's stores at 22022 Michigan Avenue, Dearborn, Michigan and 133-135 Michigan Avenue, Jackson, Michigan were visited before this affiant was aware that information was to be obtained to make a diagrammatic reproduction of the displays and the diagrams for these two stores merely show the heels and the marks on heels that were displayed in these stores.

Reproductions or replicas of the heel displays which we examined during April 10-13, 1935 at three of the defendant's stores in Detroit, namely the stores at 1201 Woodward Avenue,—5505 Michigan Avenue and 9201 Mack Avenue, have been made with rubber heels arranged and [fol. 125] mounted so as to show the heels and the marks thereon in the manner in which the exposed top heels and marks thereon were arranged and appeared in the display at the respective store above mentioned, and said reproductions or replicas are submitted herewith respectively as "Plaintiff's Exhibit No. 139—Defendant's heel display, 1201 Woodward Ave., Detroit"—Plaintiff's Exhibit 140—Defendant's heel display, 5505 Michigan Ave., Detroit" and "Plaintiff's Exhibit No. 141—Defendant's heel display, 9201 Mack Ave., Detroit". Most of the rubber heels making up said Exhibits Nos. 139, 140 and 141 were purchased by

us during April 10-13, 1935 from stores of the defendant in Detroit, Ann Arbor, Jackson, Dearborn, Pontiac, Battle Creek and Lansing, a few at a time, and as some additional heels of certain sizes and with certain marks were found to be required in making up the replica Exhibits Nos. 139, 140 and 141, the additional heels required were purchased, as I understand, from stores of defendant in Chicago, Illinois. Each of the heels on the replica Exhibits Nos. 139, 140 and 141 is marked on the back with the place of purchase.

In view of the difficulty in ascertaining the exact size of each heel in the displays that are reproduced in Exhibits Nos. 139, 140 and 141, some of the heels of the said Exhibits may not be of the exact size of the corresponding heels of the corresponding display of which the particular Exhibit No. 139, 140 or 141 is a replica, but each heel of each said replica is of the same color rubber, bears the same mark and the same color of mark and is in the same relative position and is either the same size or approximately the same size as the corresponding heel of the display that the respective replica represents. These Exhibits Nos. 139, 140 and 141 are substantially representative of and typical of the rubber heel displays that we examined in most of the stores of defendant above mentioned.

In our visits to defendant's stores at 1201 Woodward Avenue and 1449 Woodward Avenue, Detroit, Michigan, we were accompanied by Mr. J. A. Mogle, one of the salesmen for the plaintiff and he checked the rubber heel display there with us. He also accompanied us to the defendant's stores at 9201 Mack Avenue and 5505 Michigan Avenue, Detroit, and also checked the displays there.

* * * * * * * *

[fol. 126] AFFIDAVIT OF JAMES R. WILLIAMS

* * * * * * * *

I am a salesman in the employ of the plaintiff and have been in its employ since the year 1920.

Having received a request from the plaintiff to do so I went into the store of the defendant at 1008 Main Street in Lynchburg, in the County of Campbell and State of Virginia, on February 27, 1934, and there purchased from

a sales-person of the defendant engaged in the sale of rubber heels at one of the counters of the defendant two [fol. 127] pairs of rubber heels of the "Crusader" type.

* * * * * * *

I submit herewith one of these heels with the red colored circular mark as "Plaintiff's Exhibit No. 72—Defendant's large circular red Crusader heel bought by Williams in Virginia".

* * * * * * *

I submit herewith one of these heels with the orange colored circular mark as "Plaintiff's Exhibit No. 73—Defendant's large circular orange Crusader heel bought by Williams in Virginia".

The rubber heels in said store were displayed on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks, in both the red and the orange colors, were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

On March 13, 1935, at the request of the plaintiff, I again visited the store of the defendant which I had visited on February 27, 1934 at 1008 Main Street, Lynchburg, Virginia, and there purchased from a salesperson of the defendant engaged in the sale of rubber heels at one of the counters of the defendant five pairs of rubber heels of the "Crusader" and "Evergrip" types.

* * * * * * *

[fol. 128] One of these heels having an orange colored circular mark is submitted herewith as "Plaintiff's Exhibit No. 92—Defendant's large circular orange Crusader heel bought by Williams in Virginia, March 13, 1935".

One of the other of said heels with the small orange colored circular mark is submitted herewith as "Plaintiff's Exhibit No. 93—Defendant's small circular orange Crusader heel bought by Williams in Virginia March 13, 1935".

* * * * * * *

I submit herewith one of these heels with the large square yellow "Crusader" mark as "Plaintiff's Exhibit No. 94—

Defendant's large square yellow Crusader heel bought by Williams in Virginia March 13, 1935".

* * * * * * *

I submit herewith one of these heels with the smaller square yellow colored mark as "Plaintiff's Exhibit No. 95—Defendant's small square yellow Crusader heel bought by Williams in Virginia March 13, 1935".

* * * * * * *

I submit herewith one of these heels with the circular tan "Evergrip" mark as "Plaintiff's Exhibit No. 96—Defendant's circular tan Evergrip heel bought by Williams in Virginia March 13, 1935".

In the display from which I secured the five pairs of rubber heels there was also included a plain rubber heel of the [fols. 129-139] "Sure Foot" type, the mark not being colored. This mark was similar to the mark of the heel "Plaintiff's Exhibit No. 38—Defendant's plain Sure Foot heel".

The rubber heels in said store were displayed March 13, 1935 on a counter having a certain part thereof devoted to the display of rubber heels, and in this heel display rubber heels bearing the aforesaid circular marks and square marks in the orange, the yellow and the tan colors were indiscriminately displayed together. The heels which I purchased, as aforesaid, were a part of and selected from said display.

* * * * * * *

[fol. 140] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN L. PICKERING, JR., OF THE S. S. KRESGE COMPANY—Filed July 9, 1935

STATE OF MICHIGAN,
County of Wayne, ss:

John L. Pickering, Jr., first being duly sworn, deposes and says upon oath that he is of lawful age and a resident of the City of Detroit, County of Wayne and State of Michigan; that he is a buyer of the S. S. Kresge Company

and that he has absolute control of the purchasing, the merchandising and the sale of the products in his department, among which are rubber heels;

That the S. S. Kresge Company has for many years sold rubber heels manufactured by others for replacement upon shoes;

[fol. 141] That the latter part of January, 1933, the S. S. Kresge Company first began the purchasing and sale of the Crusader heel, manufactured by the Essex Rubber Company, of Trenton, New Jersey, and identified at that time by an indented crusader's head on a circular background in hollow relief, centrally located upon the face portion of the heel and in the color red;

That there was not at that time, nor has there ever been any intention to copy or simulate the trade-mark of the Mishawaka Rubber and Woolen Manufacturing Company, which does not manufacture for sale rubber heels for replacement purposes;

That the only purpose of using the crusader's head heel with the trade-mark in the color red was because they were sold in S. S. Kresge Company stores, which have been for many years identified by reason of the extensive use of the color red on its store fronts;

That when the Mishawaka Rubber and Woolen Manufacturing Company first claimed that the Crusader heel in the color red infringed its trade-mark, this deponent on May 19, 1933 telegraphed the Essex Rubber Company, as per the attached copy of the telegram ordering discontinuance of the color red;

That thereafter, approximately on or about June 6, 1933, the heels were made up with the trade-mark in the color orange and continued to be received and purchased in that color by the S. S. Kresge Company until the latter part of June, 1934;

That by a letter of June 14, 1934, the Mishawaka Rubber and Woolen Manufacturing Company complained that the Crusader heels in the color orange were also an infringement;

That thereafter, on June 29, 1934, this deponent, by a letter, a copy of which is hereto attached, ordered the Essex Rubber Company to discontinue the delivery of all kinds of rubber heels to the S. S. Kresge Company, which order was respected;

That thereafter, on or about September 15, 1934, the S. S. Kresge Company began the purchase from the Essex Rubber Company of the Crusader heel with the identifying trade-mark centrally located upon the face portion of the heel of a crusader's head in hollow relief in natural rubber color upon a diamond shaped background;

That the S. S. Kresge Company first began the purchase from the O'Sullivan Rubber Company, Inc., of its "sure-
[fol. 142] foot" heel having the identifying surface ornamentation centrally located upon the face portion of the heel of an Indian head in full headdress in hollow relief on a circular background in the color red on or about July 1, 1934;

That some time thereafter, the Mishawaka Rubber and Woolen Manufacturing Company complained that this surface ornamentation was an infringement of its trade-mark and that thereafter, approximately the latter part of November, 1934, the S. S. Kresge Company ordered the discontinuance of the Sure-Foot surface ornamentation in the color red, which was thereafter changed to color green;

That the only Sure-Foot heels and the only Crusader heels having their surface ornamentations in the color red in stock at present are heels which were delivered to the respective S. S. Kresge Company stores prior to the dates of discontinuance mentioned herein and in the affidavits of the O'Sullivan Rubber Company and of the Essex Rubber Company;

That the Ever-Grip heel of the Boston Woven Hose & Rubber Company, known as heel #9 in plaintiff's exhibits used in the interrogatories, was first purchased early in the year 1934, having as its surface ornamentation the American eagle in hollow relief in the color white, located centrally in the face portion of the heel;

That thereafter, after purchasing the heel #9 with the white insert for approximately two months, the identifying surface ornamentation was changed from the color white to a beige or tan color, which is the color presently in use;

That the color of the surface ornamentation has absolutely no relation to the quantity of sales;

That the heels with surface ornamentations in colors other than red sell equally as well, if not better, than the heels with the surface ornamentation in red, when that color was formerly used;

That the O'Sullivan Rubber Company, Inc., of New York and Gettysburg, Pennsylvania; the Essex Rubber Company, of Trenton, New Jersey and the Boston Woven Hose & Rubber Company, of Boston, Massachusetts, constitute the only sources of supply at present of heels purchased by the S. S. Kresge Company for resale at retail; that if an injunction should issue, as prayed for by plaintiff, its effect [fols. 143-165] will be to put the S. S. Kresge Company temporarily out of the rubber heel business.

That all the heels supplied to the S. S. Kresge Company by the aforementioned companies under the various trade-marks and trade names, "Crusader", "Sure-Foot" and "Ever-Grip", have always borne, in addition to the colored marks, above referred to, identifying trade-marks, symbols or other indicia, which further indicate clearly that the goods being offered for sale by the S. S. Kresge Company at its stores are not the goods manufactured by the Mishawaka Rubber and Woolen Manufacturing Company.

Further, deponent saith not.

(S.) John L. Pickering.

Subscribed and sworn to before me this 5th day of July, A. D., 1935. (S.) Nell H. Dickinson, Notary Public, Wayne County, Michigan. My commission expires April 23, 1939.

Copy of Telegram

Detroit, Mich., May 13, 1933.

Essex Rubber Company, Trenton, N. J.

MAKE UP NO MORE RED IN CRUSADER WILL SEE DAVIDSON HOTEL COMMODORE NEW YORK MONDAY

Pickering, Kresge.

June 29, 1934.

Copy of Letter

Essex Rubber Co., P. O. Box 501, Trenton, N. J.

GENTLEMEN:

We have your letter of June 27th, and are making corrections as noted, although your list is temporarily void until your Mishawaka trouble is straightened out. We

would suggest not making any shipments to our stores until this latter is accomplished.

Yours very truly, S. S. Kresge Company, —— ——,
Buyer.

JLP-W.

[fol. 166] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JAMES A. DAVIDSON OF THE ESSEX RUBBER COMPANY—Filed July 9, 1935

STATE OF NEW JERSEY,
County of Mercer, ss:

James A. Davidson, first being duly sworn, deposes and says upon oath that he is of lawful age and a resident of Trenton, New Jersey; that he has been employed by the Essex Rubber Company in the capacity of salesman for seven years; that he has personally examined the records of the Essex Rubber Company which disclose that it has manufactured rubber heels for replacement on shoes since the year 1907;

That since December, 1931, the Essex Rubber Company has used red as a color, contrasting with the black color of the heel proper, as a surface ornamentation for rubber heels manufactured by it;

That the Crusader heel, with a circular red indented crusader's head as such surface ornamentation, was manufactured and sold by the Essex Rubber Company to the S. S. Kresge Company from approximately January 30, 1933 to June 6, 1933;

That on May 19, 1933, the Essex Rubber Company received from the S. S. Kresge Company a telegram ordering all shipments of red Crusader head heels discontinued;

That beginning June 6, 1933, Crusader heels ornamented with the circular red indented crusader's head were discontinued and no further shipments thereof made to the S. S. Kresge Company; that on and after that date the Crusader heel supplied the S. S. Kresge Company was ornamented with a circular orange colored crusader's head indented in the surface thereof;

That on or about June 29, 1934 the S. S. Kresge Company ordered the Essex Rubber Company to discontinue all ship-

ments of rubber heels, which instructions were carried out;

That during the period from July 1 to September 1, 1934, the Essex Rubber Company changed its molds so as to ornament the exposed surface of its heels with an indented [fols. 167-169] diamond-shaped insert having a crusader's head thereon, the insert being the color of natural rubber, which heels are the only heels supplied by the Essex Rubber Company to the S. S. Kresge Company since on or about September 15, 1934.

(S.) James A. Davidson.

Subscribed and sworn to before me this 1st day of July, 1935. (S.) Walter E. Sandus, Notary Public, Mercer County, New Jersey. My commission expires June 21, 1939. (Seal.)

[fol. 170] In United States District Court

Affidavit of Ray M. Hoffman of the O'Sullivan Rubber Company, Inc.—Filed July 9, 1935

State of Pennsylvania,
County of Adams, ss:

Ray M. Hoffman, being first duly sworn, deposes and says that he is of lawful age and a resident of Gettysburg, County of Adams and State of Pennsylvania; that he is the secretary of the O'Sullivan Rubber Company, Inc., a corporation organized and existing under the laws of the State of Delaware, and deposes as follows:

That the O'Sullivan Rubber Company, Inc., has been manufacturing rubber heels for replacement on shoes since about the year 1889; that since about September 1, 1920, the O'Sullivan Rubber Company, Inc. and its predecessors, Victor Products Corporation and Sure-Foot Heel & Rubber Company, have been continuously using an ornamental design on rubber heels manufactured and sold by them in interstate commerce, consisting of a black and/or tan Indian head medallion on a circular background, the Indian head being in full headdress and centrally located on the exposed face portion of the heel;

That the use of a circular ornamentation, centrally located on the face portion of the heel, has been a matter

of general practice, the O'Sullivan Rubber Company, Inc. itself having produced and sold in interstate commerce since September 1, 1920 approximately 15,000,000 pairs of heels bearing such ornamentation;

That from July 1, 1934 to December 1, 1934, the O'Sullivan Rubber Company, Inc. manufactured and supplied to the S. S. Kresge Company its heels with the circular Indian head ornamentation as mentioned above, but using the color red in place of the black and/or tan theretofore used;

That on or about December 1, 1934, at the previous request of the S. S. Kresge Company, the O'Sullivan Rubber Company, Inc. discontinued the use of the red circular Indian head ornamentation as mentioned above, and began the use of the color green therefor;

[fol. 171] That since on or about December 1, 1934, no shipments of rubber heels having the red Indian head ornamentation thereon have been made to the S. S. Kresge Company;

Further deponent saith not.

(S.) Ray M. Hoffman.

Subscribed and sworn to before me this 28th day of June, A. D. 1935. (S.) Mary Rowe, Notary Public, Adams County, Pennsylvania. My commission expires March 5, 1937. (Seal.)

[fol. 172] In United States District Court

Affidavit of Catherine E. Truhn—Filed July 9, 1935

State of Michigan,
County of Wayne, ss:

Catherine E. Truhn, first being duly sworn, deposes and says upon oath that she is a resident of the City of Detroit, Wayne County, Michigan; that she is employed by Lawson & Giles, Attorneys for the defendant herein;

That at the request of William B. Giles, she studied 67 affidavits of managers of stores of the S. S. Kresge Company and from the study of these affidavits made a compilation relative to the displays of rubber heels in said stores, as set forth in said affidavits;

Deponent further says that in the 68 number of stores she finds that the affidavits show that there is a total of

11,204 pairs of rubber heels displayed, of which 1,428 were [fol. 173] rubber heels carrying the identifying trade-mark "Crusader" and having a replica of a crusader's head on an orange colored rubber disk, secured in an indented portion of the heel, and 3,274 Crusader heels with the indented diamond shaped crusader's head in natural rubber color, and 1,328 number of rubber heels having the trade-mark "Sure-Foot" thereon and having a green circular disk, showing an Indian in full headdress, secured in an indented portion of the heel and 173 number of rubber heels having the trade-mark "Crusader" thereon and having a replica of a crusader's head on a red rubber disk, secured in an indented portion of the heel and 955 number of rubber heels having the trade-mark "Sure-Foot" and having an identifying symbol of a red rubber disk having an Indian in full headdress, secured in an indented portion of the heel and 2,623 heels, having a trade-mark "Ever-Grip" and having as an identifying symbol an American eagle on a tan circular disk, secured in an indented portion of the heel and 1370 number of heels, having thereon the trade-marks but having no colored disks or other colored insert appearing thereon.

Further deponent saith not.

(S.) Catherine E. Truhn.

Subscribed and sworn to before me this 8th day of July, A. D. 1935. (S.) Mary E. Barber, Notary Public, Wayne County, Michigan. My commission expires July 14, 1937.

[fol. 174] In United States District Court

Defendant's Store Manager's Affidavits—Filed July 9, 1935

State of Michigan,
County of Wayne, ss:

W. H. Allger, being first duly sworn, deposes and says that he is of lawful age and a resident of Dearborn, Mich. and that he is the manager of the store owned and operated by the S. S. Kresge Company, located at Detroit, Mich.; that he is in charge of the display of merchandise offered for sale by the S. S. Kresge Company in said store; that the S. S. Kresge Company at said store offers for sale certain rubber heels upon which appear various trade-marks and

identifying symbols; that upon the date of this affidavit there is displayed on the counters of the said store 140 rubber heels, as follows:

(1) 0 number of heels, having thereon the trade-mark "Crusader" and having an indented diamond shaped trade-mark, being a replica of a crusader's head in a crude rubber color.

(2) 0 number of heels, having thereon the trade-mark "Crusader" and having a replica of a crusader's head in an orange colored rubber disk, secured in an indented portion of the heel.

(3) 49 "Sure Foot" heels, having thereon as an identifying symbol a green circular disk and showing an Indian in full headdress, secured in an indented portion of the heel.

(4) 0 "Crusader" rubber heels, showing a replica of a crusader's head on a red rubber disk, secured in an indented portion of the heel.

(5) 56 "Sure-Foot" heels, having identifying symbols of a red rubber disk, showing an Indian in full headdress, secured in an indented portion of the heel.

(6) 0 "Ever-Grip" heels, having thereon as an identifying symbol an American eagle in tan circular disk, secured in an indented portion of the heel.

(7) 35 heels, having thereon trade-marks, but no colored disk or other colored insert.

[fol. 175] That said number of heels on display is the average daily number so displayed and that they are never indiscriminately displayed together, but are customarily and usually arranged in such a manner as to display a variety of the colored inserts to the prospective purchaser and without emphasizing any one colored insert more than any other colored insert and in each instance segregating and massing particular colors together in order to provide an attractive display of the articles.

That on all of the rubber heels which are on display in the said store and which have been offered for sale in the said store there have always been borne, in addition to the colored makes, above referred to, identifying trade-marks, symbols or other indicia, and which further indicate clearly that the goods being offered for sale by the S. S. Kresge Company at the store are not the goods manufactured by

the Mishawaka Rubber and Woolen Manufacturing Company.

Further deponent saith not.

(S.) W. H. Allger.

Subscribed and sworn to before me this fifth day of July, A. D. 1935. (S.) A. R. Krause, Notary Public, Wayne County. My commission expires May 7, 1938. (Seal.)

[fol. 176] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO MANAGERS' AFFIDAVITS—Filed March 12, 1940

It is hereby stipulated that 67 affidavits were filed in this cause by the defendant-appellee corresponding in all respects to the affidavit of W. H. Allger which is printed herein, which additional affidavits were submitted by the managers of the S. S. Kresge Company stores listed, and which additional affidavits show the number of heels and types of heels indicated below:

	Total Heels	Square Yellow Crusader	Orange Circular Crusader	Green Circular Sure Foot	Red Circular Crusader	Red Circular Sure Foot	Tan Circular Evergrip	No Colored Mark
DETROIT, MICHIGAN								
No address given	166	74	41	1	13	1	18	18
11634 Dexter Blvd	35	7	9	0	9	9	0	1
5892 W. Fort	108	44	68	0	0	0	0	0
7348 Grand River	202	78	69	0	9	21	0	25
7354 Grand River	33	0	0	0	0	0	33	0
9012 Grand River	131	13	75	0	16	20	6	1
10786 Grand River	79	41	0	16	5	1	14	2
21720 Grand River	154	98	15	0	0	11	5	25
1461 Gratiot	108	108	0	0	0	0	0	0
9615 Gratiot	100	55	11	0	0	32	2	0
14297 Gratiot	63	30	21	0	1	0	11	0
8021 Harper	72	24	3	0	0	0	44	1
11226 E. Jefferson	63	0	19	18	0	16	5	5
13040 E. Jefferson	120	6	24	0	12	36	24	18
9542 Joseph Campau	332	0	32	160	0	20	0	120
15328 Livernois	59	45	0	0	0	0	14	0
9201 Mack Avenue	142	88	33	0	0	3	0	18
8713 Twelfth	42	0	21	0	0	21	0	0
5656 W. Vernor	165	0	16	120	0	20	0	9
7821 W. Vernor	62	0	1	37	0	10	0	14
1201 Woodward Avenue	206	1	1	84	0	74	0	46
1449 Woodward Avenue	268	0	62	32	1	80	18	70
13933 Woodward Avenue	1313	0	101	0	0	1	1113	98

[fol. 177]

	Total Heels	Square Yellow Crusader	Orange Circular Crusader	Green Circular Sure Foot	Red Circular Crusader	Red Circular Sure Foot	Tan Circular Evergrip	No Colored Mark
MICHIGAN								
Ann Arbor	94	44	18	0	8	16	4	4
35 W. Michigan, Battle Creek	85	0	3	0	0	0	82	0
55 W. Michigan, Battle Creek	423	155	135	0	41	0	83	9
22022 Michigan, Dearborn	179	22	39	0	2	0	116	0
Jackson	118	100	0	0	7	0	9	2
133 S. Burdick, Kalamazoo	138	0	0	0	0	0	130	8
114 S. Wash., Lansing	176	145	0	24	0	7	0	0
216 S. Wash., Lansing	207	197	1	0	0	0	9	0
66 N. Saginaw, Pontiac	153	0	5	70	0	34	0	44
CHICAGO, ILLINOIS								
3141 Lincoln Avenue	158	0	18	17	15	61	0	57
4657 Broadway	64	0	4	0	0	0	57	3
1135 S. Halsted	221	0	0	38	0	35	0	148
6300 S. Halsted	286	195	15	0	0	0	12	64
1318 Milwaukee	144	0	0	0	0	0	144	0
1034 E. 63rd	80	54	6	0	10	0	4	6
10 S. State	252	144	12	72	12	12	0	0
INDIANA								
Bloomington	167	97	21	12	0	22	0	15
Elkhart	183	141	30	0	0	2	0	10
17 W. Wash., Indianapolis	349	0	15	168	0	51	0	115
302 Pearl St., New Albany	89	26	16	6	1	12	4	24
Richmond	137	125	7	0	0	5	0	0
201 S. Mich., South Bend	86	26	0	0	0	7	53	0
OTHER STATES								
790 Main, Dubuque, Iowa	152	0	2	0	0	0	150	0
421 S. 4th, Louisville, Ky	324	0	0	204	0	72	0	48
624 Nicollet, Minneapolis, Minn	231	0	101	0	0	0	51	79
57 E. 7th, St. Paul, Minn	316	180	59	0	0	66	10	1
1556 S. Bdwy., St. Louis, Mo	199	122	61	0	0	0	9	7
522 Wash., St. Louis, Mo	177	0	12	11	5	2	147	0
Lincoln, Nebraska	185	112	41	0	13	0	0	19
245 Main, Orange, N. J.	21	0	0	0	0	0	21	0
472 Main, Buffalo, N. Y	169	1	15	53	0	72	0	28
Schenectady, New York	150	135	0	0	0	0	13	2
241 State, Schenectady, N. Y.	167	130	29	0	0	0	8	0
96 Main, White Plains, N. Y	122	4	12	35	0	28	0	43
402 Euclid, Cleveland, O	342	0	39	0	0	0	303	0
[fol. 178]								
85 N. High St., Columbus, O	211	207	4	0	0	0	0	0
State & High, Columbus, O	149	0	24	30	2	38	0	55
Springfield, Ohio	288	0	0	72	0	96	0	120
322 5th Ave., Pittsburgh, Pa	112	0	12	35	1	16	23	25
6902 Market, Upper Darby, Pa	79	38	20	0	0	14	0	7
3 N. Main, Wilkes Barre, Pa	103	0	17	58	0	0	28	0
1008 Main, Lynchburg, Va	165	135	19	0	0	4	5	2
324 W. Main, Clarksburg, W. Va	94	0	18	59	1	4	0	12
1423 N. 12th, Milwaukee, Wis	84	60	12	0	0	12	0	0

[fols. 179-180] IN UNITED STATES DISTRICT COURT

ORDER AS TO DUPLICATE MANAGERS' AFFIDAVITS—Filed March 12, 1940

Upon stipulation of the parties heretofore filed, and it appearing to the Court that a large number of affidavits filed by the defendant are substantial duplicates of each other, in accordance with the stipulation

It is hereby ordered that a printing of one of the affidavits and a listing of the duplicate affidavits of the identical type of the affidavit printed may be resorted to in lieu of printing the large number of duplicate affidavits.

Dated this 12 day of March, A. D. 1940.

Ernest A. O'Brien, United States District Judge.

Wm. B. Giles, Attorney for Defendant.

* * * * * * *

[fol. 181] IN UNITED STATES DISTRICT COURT

Plaintiff's Reply Affidavits—Filed July 15, 1935

REPLY AFFIDAVIT OF EARLE J. W. FINK

* * * * * * *

I am the Earle J. W. Fink, president and general manager of the plaintiff company, who has heretofore made an affidavit in behalf of the plaintiff in the above entitled cause, and by reason of my connection with and duties for the plaintiff as recited in my previous affidavit, I am familiar with and have knowledge of the matters and things referred to and stated hereinafter and in the two lists attached hereto.

That the validity of plaintiff's trade mark involved herein has been established, recognized, acknowledged and acquiesced in by others throughout many years, not only as evidenced by the 1895, 1915 and 1935 decisions in the Rice, Schlagel and Panco cases respectively which I discussed at pages 19, 20 and 10 respectively of my previous affidavit, but also as further evidenced by the decisions in the oppositions and compliance of others to demands of the plaintiff

to cease use of objectionable marks, which said oppositions and compliances referred to are set forth and explained in the two lists attached hereto and marked respectively "List No. 1, Plaintiff's Oppositions" and "List No. 2, Plaintiff's Complaints", the former of which, namely "List No. 1, Plaintiff's Oppositions" gives information regarding oppositions which plaintiff filed in the United States Patent Office to prevent, and in which the Patent Office refused registration of trade marks which others sought to register and which plaintiff regarded as an infringement of its trade mark herein, and the latter of which said lists, namely "List No. 2, Plaintiff's Complaints" gives information regarding demands made by plaintiff upon others that they discontinue using trade marks that were regarded by [fols. 182-184] plaintiff as infringing its trade mark involved herein and which said demands were complied with.

* * * * * * *

LIST NO. 1—PLAINTIFF'S OPPOSITIONS REFERRED TO IN REPLY AFFIDAVIT OF EARLE J. W. FINK

Plaintiff, Mishawaka Rubber and Woolen Manufacturing Company successfully opposed the following trade-mark applications in the United States Patent Office:

1. Serial No. 182,958, filed July 9, 1923, by Blek Co. Mfrs., St. Louis, Mo.

2. Serial No. 190,145, filed December 27, 1923, by Belleville Shoe Mfg. Co., Belleville, Ill.

3. Serial No. 214,021, filed May 8, 1925, by Keehn Brothers, Chicago, Ill.

4. Serial No. 179,936, filed April 30, 1923, by B. F. Goodrich Company, New York, N. Y.

5. Serial No. 197,881, filed May 31, 1924 by Albert F. Haynes, doing business as "The Spot Cash Shoe Store", Ottawa, Kan.

6. Serial No. 275,559, filed November 20, 1928, by Barney B. Cockrell, doing business as "Red Ball Stores", Drew, Miss.

7. Serial No. 341,413, filed September 7, 1933, by George A. Clapp and Carl F. Woods, receiver in equity of E. H. Clapp Rubber Company, Boston and Hanover, Mass.

8. Serial No. 334,432, filed January 28, 1933, by Essex Rubber Company, Trenton, N. J.

9. Serial No. 286,823, filed July 9, 1929, by Excelsior Mills, Union, S. C.

10. Serial No. 322,388, filed December 23, 1931, by Jacobs, Grossman & Rosenberg, Inc., Philadelphia, Penn.

[fols. 185-190] List No. 2—Plaintiff's Complaints Referred to in Reply Affidavit of Earle J. W. Fink

Plaintiff, in its appropriate name, Mishawaka Rubber and Woolen Manufacturing Company, or Mishawaka Woolen Manufacturing Company, gave notice to the following concerns of its objection to marks used by said concerns, and was given assurance by said concerns that the marks objected to would no longer be used:

1. Diamond Rubber Company, Akron, Ohio.
2. The B. F. Goodrich Company, Akron, Ohio.
3. Sears, Roebuck & Co., Chicago, Ill.
4. Servus Rubber Company, Rock Island, Ill.
5. The Time Cord Sole and Heel Company, Lima, Ohio.
6. Hood Rubber Company, Boston, Mass.
7. Steadfast Rubber Co., Inc., Mattapan, Mass.
8. Hori Brothers, Los Angeles, Calif.
9. Goodyear Rubber Company, St. Paul, Minn.
10. Herbist Shoe Mfg. Co., Milwaukee, Wisc.
11. Rainbow Rubber Company, Butler, Pa.
12. Tendick Shoe Mfg. Co., Milwaukee, Wisc.
13. New York Merchandise Co., Inc., New York, N. Y.
14. Chicago Mail Order Company, Chicago, Ill.
15. Grand Rapids Felt Boot Company, Grand Rapids, Mich.
16. Tyer Rubber Company, Andover, Mass.
17. Hamilton Rubber Company, New York, N. Y.
18. Bradstone Rubber Company, Woodbine, N. J.
19. Weyenberg Shoe Mfg. Co., Milwaukee, Wisc.

* * * * * * *

[fol. 191] Reply Affidavit of Manning Giles

* * * * * * *

I am the Manning Giles who has heretofore given an affidavit in behalf of the plaintiff in the above entitled cause

and I am employed in the office of E. M. Giles, counsel for plaintiff, and am familiar with the proceedings which have taken place in the case since making my above mentioned affidavit.

[fol. 192] I attended in Detroit, Michigan on June 17, 1935 with Mr. Harvey L. Hanson, of counsel for plaintiff, in connection with the securing of the order on the defendant to show cause why a preliminary injunction should not issue against the defendant in the above entitled cause and also attended with Mr. Hanson at the office of defendant's solicitors, Lawson and Giles, when copies of the motion papers were served upon them. Immediately after the service of the papers I examined the rubber heel display of the defendant at 1201 Woodward avenue, in Detroit, and found the display of rubber heels there to be substantially similar to the display of rubber heels which I had theretofore seen in the same store in April, 1935, as stated in my prior affidavit filed herein and as shown in Plaintiff's Exhibits Nos. 139 and 142, except that in the display on June 17, 1935, there were included a few rubber heels having square yellow Crusader marks like that of Plaintiff's Exhibit No. 33. In the said heel display at 1201 Woodward avenue on June 17, 1935, there were a large number of Sure Foot heels having red trade marks like "Plaintiff's Exhibit No. 34—Defendant's medium circular red Sure Foot heel" and "Plaintiff's Exhibit No. 35—Defendant's large circular red Sure Foot heel."

I thereupon purchased at defendant's said store at 1201 Woodward avenue, Detroit, from one of defendant's clerks, six pairs of rubber heels representative of all the heels in the said display on June 17, 1935, and they are as follows:

Three pairs of Sure Foot heels bearing red circular trade marks in the central portions of the tread faces thereof in three different sizes of marks, large, medium and small, like "Plaintiff's Exhibit No. 34—Defendant's medium circular red Sure Foot heel" and "Plaintiff's Exhibit No. 35—Defendant's large circular red Sure Foot heel." Also a pair of heels having green trade marks similar to "Plaintiff's Exhibit No. 37—Defendant's medium circular green Sure Foot heel." Also a pair of plain Sure Foot heels without any coloring, similar to "Plaintiff's Exhibit No. 38—Defendant's plain Sure Foot heel," and finally a pair of Crusader heels employing large yellow square marks

similar to "Plaintiff's Exhibit No. 33—Defendant's large square yellow Crusader heel."

[fol. 193] I have secured one of each of these heels together and submit them herewith as one exhibit, which is marked "Plaintiff's Exhibit No. 146—Heels purchased at 1201 Woodward avenue, Detroit, June 17 1935."

On Tuesday, July 9, 1935, after counsel for the plaintiff had received copies of the defendant's answer to the plaintiff's motion for preliminary injunction and affidavits in behalf of the defendant, I visited a store of the defendant at No. 10 South State street, Chicago. Mr. F. P. Williams, the manager of this store has made an affidavit regarding the display of rubber heels in the store. His affidavit is one of the affidavits of the defendant's store managers filed and served in behalf of the defendant. He stated in substance that on June 27, 1935, there were 252 rubber heels on display on the counters of the store, 144 being Crusader heels with indented diamond shaped trade marks, 12 being Crusader heels with orange colored marks, 72 being Sure Foot heels with green colored marks, 12 being Crusader heels with red colored marks and 12 being Sure Foot heels with red colored marks. Mr. Williams in his said affidavit, stated further.

"That said number of heels on display is the average daily number so displayed and that they are never indiscriminately displayed together, but are customarily and usually arranged in such a manner as to display a variety of the colored inserts to the prospective purchaser and without emphasizing any one colored insert more than any other colored insert and in each instance segregating and massing particular colors together in order to provide an attractive display of the articles."

I examined the heels on display at defendant's store at 10 South State Street, Chicago, on July 9, 1935 to see whether or not the heels were "indiscriminately displayed together" and also to see whether they were "arranged in such a manner as to display a variety of the colored inserts to the prospective purchaser and without emphasizing any one colored insert more than any other colored insert" and whether the heels were segregated and massed together as to particular colors. At this store I found Sure Foot heels with red colored circular marks and Sure Foot heels with green cir-

cular marks and a few Sure Foot heels without colored marks all indiscriminately mixed together in a heap in a [Tol. 194] compartment on the counter, without any orderly arrangement thereof or segregating of the marks of different colors, said heap having the red marked, green marked and no color marked heels thrown together or dumped into the compartment in a heaped up pile without regard to the color of the marks on the heels. This pile of rubber heels in which the heels with the red and green colored marks were all mixed together with only a few of the heels having no colored marks here and there in the pile was about eight inches high. In examining this pile of heels, I handled and held many of the heels and went through the pile to the bottom to see whether or not there were any rubber heels other than those bearing red, green or plain Sure Foot marks, but I found no colored marks in the entire pile other than the red and the green. There was about an equal number of red and green marked Sure Foot heels.

There were three other compartments with rubber heels next to this pile of heels and in these three other compartments the heels were laid flat and there were in these three other compartments a number of Crusader heels with square yellow marks with a few Crusader heels with red colored marks, and there were several heels of the Sure Foot type having red colored marks.

I was accompanied on my visit, July 9, 1935, to the defendant's store at 10 South State street, Chicago, by Miss Martha Stephenson and Mr. John H. Smith, and they are also making affidavits for use in reply in the above entitled case.

On July 12, 1935 in order to check the investigation I made on July 9th, at the defendant's store at 10 S. State street, I again visited that same store to see whether the defendant continued to indiscriminately display together rubber heels bearing the red and green marks as I had seen them displayed on July 9, 1935 at this store. I found the pile of the red and green marked Sure Foot heels substantially the same as I had seen it a few days before and there apparently was no substantial change in the pile or in the proportion of red and green colored marks present. On this visit of July 12, 1935, I was again accompanied by Miss Martha Stephenson and Mr. John H. Smith. The display of rubber heels in the three other compartments was substantially the same as on July 9, 1935, the larger num-

ber of trade marks being the yellow square Crusader trade [fol. 195] marks with heels bearing red and orange marks scattered here and there among the square yellow marked heels.

I made a color chart or diagram illustrating the display at 10 South State Street, Chicago, which is substantially identical with the display I saw at that store July 9th and which I checked July 12, 1935, and in this chart the heap or pile of heels with red and green and no color marks is represented diagrammatically. This colored diagram is submitted herewith as "Plaintiff's Exhibit No. 147—Colored diagram showing defendant's rubber heel display at 10 S. State street, Chicago, July 12, 1935."

I have examined the affidavits of the store managers of the defendant, copies of which were served on plaintiff's solicitor and have made a list showing the locations of the stores of the defendant mentioned in the affidavits and also lists of the various types of rubber heels said to be on display on the counters of the various stores, and submit the same herewith as "Plaintiff's Exhibit No. 148—List of defendant's stores and rubber heels on hand referred to in defendant's affidavits."

An examination of this list will show that, although plaintiff has alleged that the defendant has 687 stores in the United States and 47 stores in Canada, the defendant's affidavits refer to only 68 stores. By referring to plaintiff's Exhibit No. 148, it will be seen that in 61 of the 68 selected stores, the heel displays include heels bearing red or orange circular trade marks or both; that 41 of the stores had both red and orange marked rubber heels, that 12 of the stores had orange marked heels and no red marked heels, and that 8 of the stores had red marked heels, but no orange marked heels.

In addition to examining the rubber heel display at 10 South State street, Chicago, on July 12th, as aforesaid, I went on that date to and examined the heel displays in two other stores of the defendant, one at 1034 E. 63rd street, Chicago, and the other at 3141 Lincoln avenue, Chicago. In the rubber heel displays at each of these stores, I found that heels bearing various colored marks were indiscriminately displayed together and that the heels with the various colored marks were not segregated and massed together [fol. 196] as alleged in the affidavits of Russell E. Bailey, Manager of the store of the defendant at 1034 E. 63rd street,

Chicago, and C. B. McCarty, Manager of the store of the defendant at 3141 Lincoln avenue, Chicago. I visited these two stores on July 12, 1935, accompanied by Miss Martha Stephenson and Mr. John H. Smith. I made a colored diagram illustrating the rubber heels in the compartments on the counters of these two stores as seen by me July 12, 1935. I submit the same herewith as "Plaintiff's Exhibit No. 149—Colored diagram showing defendant's rubber heel display at 1034 E. 63rd street, Chicago; July 12, 1935" and "Plaintiff's Exhibit No. 150—Colored diagram showing defendant's rubber heel display at 3141 Lincoln avenue, Chicago, July 12, 1935."

* * * * * * *

[fols. 197-198] AFFIDAVITS OF JOHN H. SMITH AND MARTHA STEPHENSON

(The affiants, employees in the office of E. M. Giles, counsel for the plaintiff, fully corroborated the statements contained in the Reply Affidavit of Manning Giles.)

* * * * * * *

[fol. 199] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF S. S. KRESGE CLERK—Filed July 18, 1935

STATE OF MICHIGAN,
County of Wayne, ss:

Martha Smith, being first duly sworn, deposes and says upon oath as follows:

(1) That she is of lawful age and a resident of Detroit, Michigan, and has been an employee of the S. S. Kresge Company for 1½ years at its store located at Clifford street, Detroit, Michigan.

(2) That it is her duty to sell merchandise to the public, and included in the merchandise in her department are rubber heels;

(3) That she has been selling rubber heels as sales clerk for the S. S. Kresge Company for 1 year at the above store;

(4) That during that period of time, to the best of her recollection, she has had no number of requests for the "Mishko" heel of the Mishawaka Rubber and Woolen Manufacturing Company;

(5) That she has had no number of requests for "Red Dot" rubber heels; no number of requests for "Ball Band" rubber heels; no number of requests for "Red Ball" rubber heels;

(6) That she has never sold nor endeavored to sell to a customer either the Crusader, the Sure-Foot or the Ever-Grip heel as the heel of, or manufactured by, the Mishawaka Rubber and Woolen Manufacturing Company.

(S.) Martha Smith.

Subscribed and sworn to before me this 15th day of July, A. D. 1935. (S.) Samuel Van Vliet, Notary Public, Wayne County, Michigan. My commission expires April 16, 1939. (Seal.)

[fol. 200] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF S. S. KRESGE CLERK—Filed July 18, 1935

STATE OF MICHIGAN,
County of Wayne, ss:

Lillian Keast, being first duly sworn, deposes and says upon oath, as follows:

(1) That she is of lawful age and a resident of Detroit, Michigan, and has been an employee of the S. S. Kresge Company for 7 years at its store located at 9012 Gr. River, Detroit, Mich.

(2) That it is her duty to sell merchandise to the public, and included in the merchandise in her department are rubber heels.

(3) That she has been selling rubber heels as sales clerk for the S. S. Kresge Company for 7 years at the above store.

(4) That during that period of time, to the best of her recollection, she has had 0 number of requests for the

"Mishko" heel of the Mishawaka Rubber and Woolen Manufacturing Company;

(5) That she has had 12 number of requests for "Red Dot" rubber heels; 0 number of requests for "Ball Band" rubber heels; 0 number of requests for "Red Ball" rubber heels;

(6) That she has never sold nor endeavored to sell to a customer either the Crusader, the Sure-Foot or the Ever-Grip heel as the heel of, or manufactured by, the Mishawaka Rubber and Woolen Manufacturing Company.

(S.) Lillian Keast.

Subscribed and sworn to before me this 15th day of July, A. D. 1935. (S.) Myra Heppner, Notary Public, Wayne County, Michigan. My commission expires April 20, 1938.

[fol. 201] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF S. S. KRESGE CLERK—Filed July 18, 1935

STATE OF MICHIGAN,
County of Jackson, ss:

H. J. Waite, being first duly sworn, deposes and says upon oath as follows:

(1) That she is of lawful age and a resident of Jackson, Michigan, and has been an employee of the S. S. Kresge Company for 6 years at its store located at 133 W. Michigan avenue, Jackson, Michigan;

(2) That it is her duty to sell merchandise to the public, and included in the merchandise in her department are rubber heels;

(3) That she has been selling rubber heels as sales clerk for the S. S. Kresge Company for 6 years at the above store.

(4) That during that period of time, to the best of her recollection, she has had none number of requests for the "Mishko" heel of the Mishawaka Rubber and Woolen Manufacturing Company;

(5) That she has had none number of requests for "Red Dot" rubber heels; 6 only number of requests for "Ball Band" rubber heels; none number of requests for "Red Ball" rubber heels;

(6) That she has never sold nor endeavored to sell to a customer either the Crusader, the Sure-Foot or the Ever-Grip heel as the heel of, or manufactured by, the Mishawaka Rubber and Woolen Manufacturing Company.

(S.) H. J. Waite.

Subscribed and sworn to before me this 15th day of July, A. D. 1935. (S.) Charl E. Greene, Notary Public, Jackson County, Michigan. My commission expires October 11, 1935. (Seal.)

[fol. 202] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF S. S. KRESGE CLERK—Filed July 18, 1935

STATE OF MICHIGAN:
County of Kalamazoo, ss:

(Mrs.) Frona Roberts, being first duly sworn, deposes and says upon oath as follows:

(1) That she is of lawful age and a resident of Kalamazoo, Michigan, and has been an employee of the S. S. Kresge Company for 5 years at its store located at Burdick street, Kalamazoo, Michigan.

(2) That it is her duty to sell merchandise to the public, and included in the merchandise in her department are rubber heels;

(3) That she has been selling rubber heels as sales clerk for the S. S. Kresge Company for 4 years at the above store.

(4) That during that period of time, to the best of her recollection, she has had no requests for the "Mishko" heel of the Mishawaka Rubber and Woolen Manufacturing Company;

(5) That she has had no requests for "Red Dot" rubber heels; two requests for "Ball Band" rubber heels; no requests for "Red Ball" rubber heels;

(6) That she has never sold nor endeavored to sell to a customer either the Crusader, the Sure-Foot or the Ever-Grip heel as the heel of, or manufactured by, the Mishawaka Rubber and Woolen Manufacturing Company.

(S.) Frona Roberts.

Subscribed and sworn to before me this 16th day of July, A. D. 1935. (S.) V. R. Patten, Notary Public, Kalamazoo County, Michigan. My commission expires January 16, 1939. (Seal.)

[fol. 203] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF S. S. KRESGE CLERK—Filed July 18, 1935

STATE OF MICHIGAN,
County of Kalamazoo, ss:

(Miss Garnet Cloud, being first duly sworn, deposes and says upon oath as follows:

(1) That she is of lawful age and a resident of Kalamazoo, Michigan, and has been an employee of the S. S. Kresge Company for two years at its store located at Burdick street, Kalamazoo, Michigan.

(2) That it is her duty to sell merchandise to the public, and included in the merchandise in her department are rubber heels;

(3) That she has been selling rubber heels as sales clerk for the S. S. Kresge Company for one year at the above store.

(4) That during that period of time, to the best of her recollection, she has had no number of requests for the "Mishko" heel of the Mishawaka Rubber and Woolen Manufacturing Company;

(5) That she has had no number of requests for "Red Dot" rubber heels; one number of requests for "Ball

Band" rubber heels; no number of requests for "Red Ball" rubber heels;

(6) That she has never sold nor endeavored to sell to a customer either the Crusader, the Sure-Foot or the Ever-Grip heel as the heel of, or manufactured by, the Mishawaka Rubber and Woolen Manufacturing Company.

(S.) Garnet Cloud.

Subscribed and sworn to before me this 16th day of July, A. D. 1935.

(S.) V. R. Patten, Notary Public, Kalamazoo County, Michigan. My commission expires January 16, 1939. (Seal.)

[fol. 204] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF S. S. KRESGE CLERK—Filed July 18, 1935

STATE OF IOWA,
County of Dubuque, ss:

Leona Reisner, being first duly sworn, deposes and says upon oath as follows:

(1) That she is of lawful age and a resident of Dubuque, Iowa, and has been an employee of the S. S. Kresge Company for 4 years at its store located at 790 Main street, Dubuque, Iowa.

(2) That it is her duty to sell merchandise to the public, and included in the merchandise in her department are rubber heels;

(3) That she has been selling rubber heels as sales clerk for the S. S. Kresge Company for 3½ years at the above store.

(4) That during that period of time, to the best of her recollection, she has had 0 number of requests for the "Mishko" heel of the Mishawaka Rubber and Woolen Manufacturing Company;

(5) That she has had 0 number of requests for "Red Dot" rubber heels; 0 number of requests for "Ball Band" rubber heels; 2 number of requests for "Red Ball" rubber heels;

(6) That she has never sold nor endeavored to sell to a customer either the Crusader, the Sure-Foot or the Ever-Grip heel as the heel of, or manufactured by, the Mishawaka Rubber and Woolen Manufacturing Company.

(S.) Leona Reisner.

Subscribed and sworn to before me this 15th day of July, A. D. 1935.

(S.) Florence E. Buxton, Notary Public, Dubuque County, Iowa. My commission expires July 4, 1936. (Seal.)

[fol. 205] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF S. S. KRESGE CLERK—Filed July 18, 1935

STATE OF KENTUCKY,
County of Jefferson, ss:

Josephine Frances Everhart, being first duly sworn, deposes and says upon oath as follows:

(1) That she is of lawful age and a resident of Louisville, Kentucky, and has been an employee of the S. S. Kresge Company for 5 years at its store located at 412 So. 4th street, Louisville, Kentucky;

(2) That it is her duty to sell merchandise to the public, and included in the merchandise in her department are rubber heels;

(3) That she has been selling rubber heels as sales clerk for the S. S. Kresge Company for 2 years at the above store.

(4) That during that period of time, to the best of her recollection, she has had none number of requests for the "Mishko" heel of the Mishawaka Rubber and Woolen Manufacturing Company;

(5) That she has had none number of requests for "Red Dot" rubber heels; none number of requests for "Ball Band" rubber heels; 3 number of requests for "Red Ball" rubber heels;

(6) That she has never sold nor endeavored to sell to a customer either the Crusader, the Sure-Foot or the Ever-

Grip heel as the heel of, or manufactured by, the Mishawaka Rubber and Woolen Manufacturing Company.

(S.) Josephine Frances Everhart.

Subscribed and sworn to before me this 15th day of July, A. D. 1935. (S.) Sidney Smier, Notary Public, Jefferson County, Kentucky. My commission expires July 21, 1938. (Seal.)

[fol. 206] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO DUPLICATE AFFIDAVITS—Filed March 11, 1940

It is hereby stipulated that 112 affidavits were filed in this cause by the defendant-appellee corresponding in all respects to the affidavit of Martha Smith which is printed herein, ante on page 100, which additional affidavits were signed by the following salesgirls:

	Sold Heels	Address of Store	
1 yr.	Julia Casey	Clifford Street	Detroit, Michigan
4 yrs.	Hilda Johnson	Clifford Street	Detroit, Michigan
2 yrs.	Mary Gartner	11634 Dexter Blvd.	Detroit, Michigan
4 yrs.	Hattie McCauley	5892 W .Fort Street	Detroit, Michigan
1 yr.	Rose Shahinian	7348 Grand River	Detroit, Michigan
5 yrs.	Dorothy Christopher	7348 Grand River	Detroit, Michigan
2 yrs.	Helen Novikoff	7354 Grand River	Detroit, Michigan
5 yrs.	Rosemond Williams	9012 Grand River	Detroit, Michigan
6 mo.	Margaret Blair	10786 Grand River	Detroit, Michigan
5 yrs.	Pearl Houghton	10786 Grand River	Detroit, Michigan
1 yr.	Catherine Murbach	21720 Grand River	Detroit, Michigan
1½ yrs.	Lois Block	Gratiot Street	Detroit, Michigan
3 yrs.	Angeline Clavenna	1461 Gratiot Street	Detroit, Michigan
2 yrs.	Mary Jane Fuller	9615 Gratio Street	Detroit, Michigan
1 yr.	Julia Mierzwa	9615 Gratiot Street	Detroit, Michigan
4 mo.	Ruby Hargrove	8021 Harper Street	Detroit, Michigan
7 mo.	Germaine Kehrer	8021 Harper Street	Detroit, Michigan
13 mo.	Betty Gaeschke	8021 Harper Street	Detroit, Michigan
1 yr.	Agnes E. LaTour	11226 E. Jefferson	Detroit, Michigan
2 yrs.	Beatrice E. Bryson	11226 E. Jefferson	Detroit, Michigan
3 yrs.	Bertha Arnett	13040 E. Jefferson	Detroit, Michigan
1 yr.	Eleanore Antoszewksi	9542 Joseph Campau	Detroit, Michigan
4 yrs.	Tillie Gizinska	9542 Joseph Campau	Detroit, Michigan
9 yrs.	Blanche Poplawski	9542 Joseph Campau	Detroit, Michigan
5 yrs.	Marv Temple	15328 Livernois	Detroit, Michigan
5 yrs.	Eileen Burke	15328 Livernois	Detroit, Michigan
1 yr.	Minnie Jacob	15328 Livernois	Detroit, Michigan
2 yrs.	J. LaPaul	9201 Mack Street	Detroit, Michigan
¾ yrs.	Genevieve Rozek	Michigan Avenue	Detroit, Michigan
4 yrs.	Blanche Pearl	8713—12th Street	Detroit, Michigan
5 yrs.	Ruth Creekmur	5656 W. Vernor Highway	Detroit, Michigan
4 yrs.	Nellie Yenulis	7821 W. Vernor Highway	Detroit, Michigan
1½ yrs.	Margaret Nemeth	1201 Woodward Avenue	Detroit, Michigan
1 yr.	Letta Batten	1201 Woodward Avenue	Detroit, Michigan
1 yr.	Louise Simpson	Woodward & Grand Blvd.	Detroit, Michigan
2 yrs.	Ellen Jordan	Woodward & Grand Blvd.	Detroit, Michigan
3 yrs.	Lucy Turk	13933 Woodward Avenue	Highland Park, Michigan
1 yr.	Mistle Bennett		Ann Arbor, Michigan

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	Sold Heels	Address of Store	
8 mo.	Iva Shrake		Ann Arbor, Michigan
5 yrs.	Harriett LaForce	35 W. Michigan Street	Battle Creek, Michigan
7 yrs.	Juanita Willshon	35 E. Michigan Street	Battle Creek, Michigan
1½ yrs.	Marian L. DeLing	59 W. Michigan Street	Battle Creek, Michigan
7 mo.	Mary Prehn	22022 Michigan Street	Dearborn, Michigan
1 yr.	E. E. McConnell	133 W. Michigan Street	Jackson, Michigan
2 mo.	Mary Olivett	Burdick Street	Kalamazoo, Michigan
14 yrs.	Blanche Davidson	1145 S. Washington	Lansing, Michigan
1 yr.	Stella Mazurek	114 S. Washington	Lansing, Michigan
3 yrs.	Frances Ayler	216 S. Washington	Lansing, Michigan
1 yr.	Marguerite Lospinuso	216 S. Washington	Lansing, Michigan
3 yrs.	Edith Frezza	66 No. Saginaw	Pontiac, Michigan
¼ yr.	Frances Giddings	66 No. Saginaw	Pontiac, Michigan
¾ yr.	Dorothy L. Nevenzeel	66 No. Saginaw	Pontiac, Michigan
6 yrs.	Helen Royster	4657 Broadway	Chicago, Illinois
4 yrs.	Justina Frazzini	1335 So. Halstead	Chicago, Illinois
5 yrs.	Anna Lorence	6300 So. Halstead	Chicago, Illinois
1 yr.	Jpne Seena Davison	6300 So. Halstead	Chicago, Illinois
3 mo.	Anna Huska	3141 Lincoln Avenue	Chicago, Illinois
2½ yrs.	Marcyanna Smigiel	1318 Milwaukee	Chicago, Illinois
3 yrs.	Margaret Grison	1034 E. 63rd Street	Chicago, Illinois
1 yr.	Margaret Katherine Nelson	10 S. State	Chicago, Illinois
1 yr.	Etta Hanskat	10 S. State	Chicago, Illinois
8 yrs.	Verena Stoehr	10 S. State	Chicago, Illinois
3 yrs.	Dorothy Martin Spannuth	101 N. College	Bloomington, Indiana
2 yrs.	Doris Hendershott	303 So. Main Street	Elkhart, Indiana
113 yrs.	Alice Hamilton	17 W. Washington	Indianapolis, Indiana
3½ yrs.	Wilmirth Clark	17 W. Washington	Indianapolis, Indiana
2½ yrs.	Clara Marie Wright	302 Pearl Street, Rt. 3	Georgetown, Indiana
1½ yrs.	Nedra Yoke	801 Main Street	Richmond, Indiana
8 yrs.	Mary A. Nemeth	201 So. Michigan	South Bend, Indiana
6 yrs.	Helen M. Moon	201 So. Michigan	South Bend, Indiana
2 mo.	Anna Katherine Self	412 So. 4th Street	Louisville, Kentucky
2 yrs.	Mary Nora Rush	412 So. 4th Street	Louisville, Kentucky
2 yrs.	Frances Blair	624 Nicollet Avenue	Minneapolis, Minnesota
— yr.	Helen Grunke	57 E. 7th Street	St. Paul, Minnesota
1-5/6 yrs.	Josephine Zimmer	57 E. 7th Street	St. Paul, Minnesota
2¾ yrs.	Elva A. Jones	57 E. 7th Street	St. Paul, Minnesota
8 yrs.	Ann Sept		St. Louis, Missouri
2½ yrs.	Catheryn Ehrlich	1556 So. Broadway	St. Louis, Missouri
4 yrs.	Bernice Newport	6108 Easton Street	St. Louis, Missouri
11 yrs.	Margueritte Leesy	522 Washington	St. Louis, Missouri
½ yr.	Audrey Hison	6th & Washington	St. Louis, Missouri
2 yrs.	Isleta F. Gerdes	1125 O Street	Lincoln, Nebraska
6 yrs.	Teresa L. Bourke	1125 O Street	Lincoln, Nebraska
9 yrs.	Katie E. Milholland	1125 O Street	Lincoln, Nebraska
2½ yrs.	Ruth Stieve	245 Main Street	East Orange, New Jersey
6 yrs.	Ruth Boehme	472 Main Street	Buffalo, New York
1 yr.	Emelia Weitzsacker	472 Main Street	Buffalo, New York
1 yr.	Margaret Jahnke	472 Main Street	Buffalo, New York

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7 yrs.	Pauline Rowney	241 State Street	Schenectady, New York
1½ yrs.	Dorothy R. Newman	425 State Street	Schenectady, New York
1½ yrs.	Clara Schermerhorn	425 State Street	Schenectady, New York
4-1/6 yrs.	Florence Koenig	96 Main Street	White Plains, New York
4½ yrs.	Matilda Palletta	96 Main Street	White Plains, New York
4 yrs.	Emma Abeling	402 Euclid Avenue	Cleveland, Ohio
4 yrs.	Bessie Harris	402 Euclid Avenue	Cleveland, Ohio
10 yrs.	Clara Griffith	85 N. High Street	Columbus, Ohio
6 yrs.	Mable Myers	85 S. High Street	Columbus, Ohio

	Sold Heels	Address of Store	
yrs.	Helen Jenkins	85 S. High Street	Columbus, Ohio
mo.	R. E. Dolph	25 Main Street	Springfield, Ohio
yr.	Jean Wylie	25 Main Street	Springfield, Ohio
mo.	Marie Roof	25 Main Street	Springfield, Ohio.
yrs.	Gladys Johnson	(401 Adams Street	Toledo, Ohio
		(9615 Gratiot	Detroit, Michigan
1 yrs.	Mary Richardson	322 Fifth Street	Pittsburgh, Pennsylvania
yrs.	Grace Wojtyna	322 Fifth Street	Pittsburgh, Pennsylvania
yrs.	Alice C. Tickner	322 Fifth Street	Pittsburgh, Pennsylvania
yr.	Ethel K. Bork	6902 Market Street	Upper Darby, Pennsylvania
yrs.	Emma L. Vallone	6902 Market Street	Upper Darby, Pennsylvania
yrs.	Florence Moore	3 S. Main Street	Wilkes Barre, Pennsylvania
wks.	Emma Love	3 S. Main Street	Wilkes Barre, Pennsylvania
yr.	Irene Saunders	1008 Maine Street	Lynchburg, Virginia
yrs.	Mary LePon	324 Main Street	Clarksburg, W. Virginia
yrs.	Helen McFarland	1423 N. 12th Street	Milwaukee, Wisconsin

It is further stipulated that printing of said affidavits in the record would be mere duplication and that such duplication may be dispensed with.

Dated this 11th day of March, A. D. 1940.

(S.) Eugene M. Giles, Thos. S. Donnelly, Attorneys for Plaintiff-Appellant. (S.) Wm. B. Giles, Attorney for Defendant-Appellee.

[fols. 209-212] In United States District Court

Order as to Duplicate Affidavits—Filed March 11, 1940

Upon stipulation of the parties heretofore filed, and it appearing to the Court that a large number of affidavits filed by the defendant are substantial duplicates of each other, in accordance with the stipulation,

It is hereby ordered that a printing of one of the affidavits and a listing of the affiants signing the identical type of affidavit may be resorted to in lieu of printing the large number of duplicate affidavits.

Dated this 11th day of March, A. D. 1940.

(S.) Edward J. Moinet, United States District Judge.

O. K.

(S.) Wm. B. Giles, Atty. for Deft.

In United States District Court

Part of Preliminary Proceedings Held August 10, 1935—Filed March 14, 1940

Proceedings had on the motion of the plaintiff for a temporary injunction before Honorable Arthur J. Tuttle, at Detroit, Michigan, Saturday, August 10, 1935, at two o'clock P. M.

(Argument on behalf of the plaintiff was presented to the Court by Mr. Hanson and on behalf of the defendant by Mr. Smith.)

(Argument on behalf of the defendant by Mr. Giles.)

. . . . . .

[fol. 213] The Court: Here is the way I feel about it now. I am not going to shut off the argument entirely. I will hear you a little more, but as to the round red spot, I do not put much differentiation into the case as to whether that round spot has got some figures in it, or a little wording in it, or what. I could remember away back to the days when I was a boy on the farm, and wore rubber boots and felt boots. I can remember that spot some way got into my head as indicating a good manufacture, a good boot. That is as true as I sit here. I can remember very well, just like I learned a lot of things as a boy. That is the time you are learning, and I remember getting that impression, an I have a feeling that the round red spot has attached some real value to it. I was quite surprised when I started in here to find that here you did get a trade mark for it a good many years ago, I have read that clear through while this hearing has been going on and that seems to be the main thing they got a trade mark for, a round red spot. As I think of it, it has no more use on a boot than that black court plaster that the ladies wear on their cheek. It does not serve any purpose at all, but there it is. It is a red spot on that boot, and I am inclined [fols. 214-218] to think that both from the standpoint of unfair competition and from the standpoint of the trade

mark that a round red spot is the thing. These people have got that round red spot. I have not had the final hearing in the case. I do not know what they will show, but I feel pretty sure that that round red spot on footwear belongs to them.

I do see a little bit of danger of mixing a few of them in in the show case and on the counter in selling them, and I am glad to find that there are not very many of those here. I am inclined, temporarily, to stay the selling of those few. If I stay them from selling, I am not going to do very much harm to Kresge Company. If it turns out that I am wrong, they will have those in a box and they will sell them after I have decided that question. I would not have done them very much harm.

I am inclined to restrain them from buying any more of the orange until I can hear it; or, any color, any of these that are round and have the red shades. The trade mark was pretty careful to take care of that. They covered a variety of shades, of real light or real dark. Orange may, in the dictionary, be a different color from red, but I think that trademark fairly tried to cover that, red, reddish, and those colors that have those shades in them.

I am not inclined to stop them from selling those orange ones now. I do not believe that they are so bad. On a temporary injunction, you ought to weigh the thing. I would stop you, I think from buying any more, but let you sell all your colors except those round red ones; but do not buy any more that have even the shade of red, which would include the orange. That is what I am inclined to do on a temporary injunction today. You cannot do full justice in a temporary injunction, but I do not believe anybody is going to be badly hurt by operating under that. I do not see how Kresge would be, and if they cannot buy any more orange or any more of any red color, you are soon going to get out of them, and I will stop them entirely from selling those that are really red. The only mixing that there can possibly be will be those few so-called orange ones that they have on hand, along with those others, until they get them cleaned out.

* * * * * * *

[fol. 219] IN UNITED STATES DISTRICT COURT

ORDER FOR PRELIMINARY INJUNCTION—Filed August 10, 1935

At a session of said Court, held in the Federal Building, in the City of Detroit, in said District, this 10th day of August, 1935.

Present: Honorable Arthur J. Tuttle, District Judge.

This cause having come on to be heard at this term on the motion of plaintiff for a preliminary injunction supported by the affidavits and exhibits filed in behalf of the plaintiff, the affidavits and exhibits of the defendant, the arguments of counsel for both parties and the Court being fully apprised in the premises, it is

Ordered, Adjudged and Decreed by the Court as follows:

1. That the defendant be and it hereby is, beginning August 19, 1935, restrained and enjoined until the further [fols. 220-222] order of this Court from purchasing footwear or any parts thereof carrying as a distinctive mark a circular figure of red color, or any shade thereof including orange, and from the selling or disposing of footwear, or any parts thereof, carrying as a distinctive mark a circular figure of red color, or any shade thereof not including orange and that upon the posting with the Clerk of this Court of a bond in the sum of Five Thousand ($5,000.00) Dollars, conditioned upon indemnifying defendant against the improvident issuance of the preliminary injunction, a writ of injunction effective beginning August 19, 1935 and continuing until the further order of this Court, be issued out of and under the seal of this Court by the Clerk directed to and against the defendant herein, its officers, agents, servants, employees, solicitors and representatives of every kind and grade restraining and enjoining them and each of them in accordance with the terms of this order.

2. That plaintiff's motion for a preliminary injunction to enjoin defendant from the sale of rubber heels having a surface ornamentation in colors other than those mentioned in paragraph 1 hereof, be and the same hereby is denied.

Arthur J. Tuttle, United States District Judge. Approved as to form and substance: Thos. S. Donnelly Solicitor for Plaintiff. Lawson & Giles, Dike, Calver & Gray, Solicitors for Defendant.

[fol. 223] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO EVIDENCE—Filed April 4, 1938

It is hereby stipulated by and between counsel for the parties to the above entitled cause, the Honorable Court consenting thereto, that this cause be submitted for final hearing on the pleadings, the interrogatories and answers, the affidavits presented upon the motion for preliminary injunction, the exhibits submitted with and referred to in the interrogatories and answers and the exhibits submitted with and referred to in the affidavits presented upon the motion for preliminary injunction and that such pleadings, interrogatories and answers, and affidavits and exhibits be made the record, testimony and evidence on final hearing.

(S.) Eugene M. Giles, Counsel for Plaintiff. Chicago, Illinois, February 19, 1936. (S.) Wm. B. Giles, Counsel for Defendant. Detroit, Michigan, May 7, 1936.

[fol. 224] IN UNITED STATES DISTRICT COURT

ORDER APPROVING STIPULATION OF FACTS—Filed April 4, 1938

It appearing to the Court that counsel for both parties in the above entitled case have stipulated that this cause be submitted for final hearing on the pleadings, the interrogatories and answers, the affidavits presented upon motion for preliminary injunction, the exhibits submitted with and referred to in the interrogatories and answers and the exhibits submitted with and referred to in the affidavits presented upon the motion for preliminary injunction and that such pleadings, interrogatories and answers, and affidavits and exhibits be made the record testimony and evidence on final hearing.

It is hereby ordered and directed that the said stipulation be, and the same is hereby, approved.

(S.) Arthur F. Lederle, United States District Judge. Dated April 4, 1938.

IN UNITED STATES DISTRICT COURT

OBJECTIONS TO ADMISSIBILITY IN EVIDENCE OF PORTIONS OF AFFIDAVITS FILED IN PLAINTIFF'S BEHALF—Filed April 20, 1938

Comes now the defendant above named, S. S. Kresge Company, by its attorneys, Lawson & Giles, pursuant to the right reserved in open Court on April 4th, 1938, and makes objections to the admissibility in evidence of certain portions of the affidavits filed by and in behalf of plaintiff, as follows:

I

It objects to the admissibility in evidence of the latter half of paragraph one of page two of the affidavit of Austin [fol. 225] Bryan and for the reason that the same is hearsay.

II

It objects to the admissibility in evidence of the last paragraph on page two of the affidavit of John L. Duncan for the reason that it is hearsay, consists of an opinion and conclusion evidence and for the further reason that there is no showing that the clerk in question was authorized to speak for the defendant.

III

It objects to the admissibility in evidence of the following portions of the affidavit of Earle J. W. Fink, dated June 13th, 1935:

(a) To the last paragraph on page eight for the reason that it is an opinion and a conjectural conclusion and argumentative.

(b) It enters the same objection to both paragraphs on page ten and to the balance of the second paragraph which is concluded at the beginning of page eleven.

(c) It objects to both paragraphs on page nineteen and the first paragraph on page twenty because the same is immaterial, argumentative and the actions of others or of

other trial courts of equal jurisdiction in other cases form no binding precedent upon this court in this case.

(d) It enters the same objection to page twenty-three and twenty-four and the first paragraph on page twenty-five and further objects that the actions of the Essex Rubber Company in no way can be material or bind this defendant in this proceeding.

(e) It objects to page twenty-six for the reason that the opposition proceedings were with some other party, not the party defendant and cannot bind it.

(f) It objects to the second paragraph on page thirty-one for the reason that it consists of hearsay and a conclusion.

[fol. 226] (g) It objects to the last paragraph on page thirty-three for the reason that correspondence with and from H. S. Maddock, Receiver, in no way is binding upon the defendant.

(h) It makes the same objection to the last paragraph on page thirty-four.

(i) It objects to the last paragraph beginning on page thirty-eight and remainder thereof on page thirty-nine for the reason that the same is hearsay and consists of a conjectural conclusion.

IV

It objects to the first paragraph on page three of the affidavit of Leo L. Harper for the reason that the same is hearsay; the statements of the clerk are not binding upon this party defendant.

V

It objects to the latter part of the first paragraph on page two of the affidavit of Kenneth L. Keene for the reason that the same consists of hearsay and a conclusion.

VI

It objects to the first paragraph on page four of the affidavit of William G. Klein, Sr. for the reason that the same consists of hearsay and that the statements of the clerk are inadmissible because hearsay, are unauthorized and not binding on this defendant.

VII

It objects to the admissibility in evidence of the last paragraph on page one of the affidavit of Earle J. W. Fink dated July 12, 1935, and the material referred to therein and of the opposition and compliance by others and the actions and decisions of the Patent Office for the reason that the same is immaterial, not binding on this defendant and not a binding precedent in this case.

(S.) Lawson & Giles, Attorneys for Defendant. 2433 Barlum Tower, Detroit, Michigan. Ra. 1710. Dated: Detroit, Michigan, April 11, A. D. 1938.

[fols. 227-236] In United States District Court

Proceedings Held April 20, 1938

* * * * * * *

[fol. 237] Mr. Giles: It objects to the last paragraph beginning on page 38 and remainder thereof on page 39 for the reason that the same is hearsay and consists of conjectural conclusions.

[fols. 238-249] The Court: The Court will take judicial notice of part of that last paragraph on page 38.

Mr. Giles: Yes. That isn't the part that I meant.

He says that "he believed that the acts have been and are causing a very great amount of damage to plaintiff and he believed that * * *" and so forth.

The Court: Well, I think that is admissible to show the state of mind, if you want to call it that, of the plaintiff, and to that I think that there is no particular objection, the statement—which we know—that as of March 19, 1935, when this Court was running short-handed, it would be a long time before the case would be reached.

Mr. Giles: Oh, no.

The Court: And, of course, that conjecture was pretty well taken.

Mr. Giles: Yes. Now, the feature I object to is: "believed that the plaintiff is accruing a very great amount of damage". Now, as proof of damage, of course, that is obviously an admission.

The Court: Yes; I will agree with you.

Mr. Donnelly: That statement, your Honor, was merely for a——

The Court (Interposing): It will not be governed as damages to the plaintiff.

Mr. Giles: Yes.

The Court: All right.

Mr. Giles: That concludes my objections to Fink's affidavit.

The Court: All right.

* * * * * * *

[fol. 250] IN UNITED STATES DISTRICT COURT

Court's Findings of Fact and Conclusions of Law—Filed December 6, 1938

The facts involved herein are not in serious dispute, and the proof consisted of numerous affidavits which, by stipulation, were made part of the record plus other documentary evidence which was likewise admitted upon stipulation. Voluminous briefs were filed on behalf of both parties and the oral arguments were exceptionally well prepared. As I view the controversy, however, the material facts are relatively simple and may be stated as follows:

FINDINGS OF FACT

1. Plaintiff is a corporation duly organized and existing under the laws of the state of Indiana having its principal place of business at Mishawaka, Indiana; and the defendant is a corporation duly organized and existing under the laws of the state of Michigan having its principal place of business at Detroit, Michigan. The amount in controversy exclusive of interest and costs exceeds the sum or value of $3,000.

2. The plaintiff corporation for many years has been engaged in the manufacture, sale and distribution of footwear of various kinds and for more than 35 years has been making rubber heels for use on its boots and shoes and applying its trade-mark or trade-marks directly to said rubber heels. These trade-marks in many cases also ap-

peared elsewhere on the boots and shoes and on packages containing the same and have become well known to the public.

3. Continuously since on or about 1898 the plaintiff has used a trade-mark for its goods consisting of a circular figure or ball colored red and applied directly to the tread face of the plaintiff's rubber heels at approximately the center thereof. This trade-mark was registered in 1901 and its registration has been renewed and all rights to said trade-mark are still owned by the plaintiff.

4. Since about 1917 plaintiff has so embedded a circular plug of red color in the rubber heels marketed by it that [fol. 251] as the heel wore the plug with its contrasting colors would continue to show. In this way the trade-mark lasted as long as the heel in which it was embedded and served to identify the plaintiff's products not only when they were first manufactured and sold but throughout the entire life of the heel.

5. In combination with the red circular ball figure, the plaintiff also used other trade-marks consisting generally of the words "Ball Brand" which trade-mark was also registered in the United States Patent Office. These marks were used together in various ways, but sometimes only the red circular ball figure was used.

6. Plaintiff has spent and is continuing to spend large sums of money in advertising and in prominently displaying this red circular figure as an identifying mark of origin. This has caused the trade to associate this trade-mark with the plaintiff's products.

7. Plaintiff has not sold rubber heels bearing this trade-mark in the American market except as such heels were attached to the footwear which it manufactured and sold.

8. The defendant, the S. S. Kresge Company, has a large number of stores and has sold at retail rubber heels and rubber heel lifts purchased from the Essex Rubber, the O'Sullivan Rubber Company, and the Boston Woven-Hose & Rubber Company. These heels are prominently displayed by the defendant on counters in its stores and although sold under other trade names the trade-mark is so applied that the most prominent part is a circular plug of red or

reddish color so closely resembling that of the plaintiff that it is difficult to distinguish the products sold by the defendant from the plaintiff's products.

9. The ordinary purchaser, having become familiar with the plaintiff's trade-mark, would naturally be led to believe that the heels marketed by the defendant were the product of the plaintiff company.

10. Upon discovery by the plaintiff of the defendant's sale of the above-described type heels and heel lifts, the plaintiff notified the defendant of its trade-mark of the red circular ball figure and thereafter defendant stopped giving orders to its supply company for heels and heel lifts bearing a red circular figure, but did order for its counters heels bearing circular figures in orange, green, tan, yellow, and also figures with a square or diamond shaped plug in [fol. 252] yellow, tan, and other colors. Defendant mixed these heels indiscriminately on its counters with the heels it had remaining in stock with the red circular figure.

11. The heels sold by the defendant were of inferior quality as compared to the heels manufactured and sold by the plaintiff and attached to their product and this tended to destroy the good will created by the plaintiff in the manufacture of its superior product. Likewise, when one of the defendant's heels was attached to footwear not manufactured by the plaintiff it would tend to cause purchasers to believe that the entire article of footwear was manufactured by the plaintiff.

12. The markings on the products marketed by the defendant are an infringement of plaintiff's trade-mark and the methods used in the sale of defendant's products constituted unfair competition.

Conclusions of Law

1. This is a suit in equity arising under the trade-mark laws of the United States for the infringement of a trade-mark registered in the United States Patent Office and for unfair competition. The parties hereto are citizens of different states. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.

2. Color may constitute a valid trademark provided it is impressed in a particular design such as a circle, square, triangle, cross, or star.

Hygienic Products Co. v. Coe, 85 Fed. Sec. 264.

Leschen & Sons' Rope Co. v. Broderick & Bascom Rope Co., 201 U. S. 166.

Diamond Match Co. v. The Saginaw Match Co., 142 Fed. 728.

3. The fact that the Patent Office permitted the registration of the trademark was a very definite presumption both of the ownership of the trademark and of the validity thereof.

Alfred Schneier Co. Inc. v. Bramson, 16 Fed. Supp. 494.

Chapin-Sacks Mfg. Co. v. The Hendler Creamery Co., 254 Fed. 553.

[fols. 253-284] 4. When a mark through its use over a long period of time acquires a secondary meaning so as to be recognized by the purchasing public as indicating the source or origin of the goods with which used it is entitled to protection under the doctrine of unfair com-

Barton v. The Rex Oil Co. Inc., 29 Fed. Sec. 474.

H. E. Winterton Co. v. Auto Sales Gum Co., 211 Fed. 612.

Ohio Baking Co. v. National Biscuit Co., 127 Fed. 116.

W. G. Reardon Laboratories v. B. & B. Exterminators, 71 Fed. Sec. 515.

5. The defendant is guilty of infringing plaintiff's trademark and is guilty of unfair competition and such trademark infringement and unfair competition continued after direct notice to the defendant. A decree may be entered enjoining the defendant from the use of any red or reddish circular ball figure in rubber heels sold by it and providing for an accounting for profits unlawfully derived from the violation of the plaintiff's right.

petition.

(Signed) Arthur F. Lederle, District Judge.

[fol. 285] IN UNITED STATES DISTRICT COURT

COURT'S AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed October 5, 1939

Findings of fact and conclusions of law were filed by this court on December 6, 1938. Subsequently motions to amend these findings were filed by both the plaintiff and the defendant. At the hearing in open court counsel for both parties were given an opportunity to state their objections to the opposing party's requests. On June 26, 1939, the matter was adjourned at the request of counsel for both parties to permit them to file briefs in support of their motions and objections. Very well prepared and extensive briefs were filed by both sides.

[fols. 286-287] I

Plaintiff's request to amend line 3, paragraph 5, from "Ball Brand" to "Ball Band", and line 3, paragraph 8, from "Essex Rubber" to "Essex Rubber Company", and line 4 of said paragraph from "Ribber" to "Rubber" are merely typographical, and the defendant having consented thereto, these amendments may be allowed.

* * * * * * *

[fols. 288-289] III

If the remaining requests of the plaintiff were granted, it would amount to giving the plaintiff a trade mark monopoly for all colors contained in a circular ball-like figure. I am still of the opinion that the plaintiff is not entitled to this finding, and these requests are denied.

* * * * * * *

[fols. 290-297] V

The remaining requests for amendments filed by the defendant become immaterial if the plaintiff's claim is limited to red or reddish colors, and are therefore disallowed.

CONCLUSIONS OF LAW

1. These amendments will not change the conclusions of law heretofore filed by this court and the request of plaintiff for amended conclusions of law is denied.

(S.) Arthur F. Lederle, United States District Judge.

* * * * * * * *

[fol. 298] IN UNITED STATES DISTRICT COURT

PROCEEDINGS HELD NOVEMBER 27, 1939—Filed March 14, 1940

Proceedings had and taken in the above-entitled matter before the Honorable Arthur F. Lederle, District Judge, at Detroit, Michigan, on Monday, November 27, 1939, at two o'clock p. m.

The Court: Mishawaka Rubber and Woolen Manufacturing Company v. S. S. Kreske Company.

Mr. Donnelly: Your Honor, since the last session we had this motion for amendment of the amended findings of fact, counsel for both parties have gotten together and we have agreed on the wording of the findings of fact in certain sections which were embraced in the motion to amend; and, as far as this motion, therefore, before the Court is concerned, there seems to be no controversy between either party.

The Court: All right. Do you have a proposed order there?

(A document was thereupon presented to the Court.)

The Court: I will sign it and you may be on your way.

Mr. Donnelly: We have agreed on the wording of these findings, your Honor. We don't want the record to show we are acquiescing in them, or waiving any objections to them.

The Court: Yes, that is the way I understood it.

* * * * * * * *

[fol. 299] IN UNITED STATES DISTRICT COURT

Court's Additional Amended Findings of Fact and Conclusions of Law—Filed November 27, 1939

FINDINGS OF FACT

This cause coming on to be heard upon a motion by the Plaintiff for an Amendment of the Amended Findings of Fact and Conclusions of Law, heretofore filed in this cause, and the Court having been duly apprised in the premises at a hearing in open court on the 20th day of November, 1939, and counsel for both parties having been heard, it is hereby ordered, directed and decreed that:

1. Section II of the Amended Findings of Fact beginning on page 2 thereof, is changed to read, as follows:

(6) That there be adopted and filed the following findings of fact, to-wit:

(a) Upon discovery by the Plaintiff of the Defendant's sale of the above described type of heels, bearing the red circular mark, the Plaintiff, under date of May 9, 1933, notified the Defendant of infringement, and that the Defendant under date of May 19, 1933, replied to said notification of infringement and informed the Plaintiff of its willingness to request its manufacture to use some other color unlike red, which statement was adopted by the Plaintiff.

(b) That the Defendant notified the Essex Rubber Company, its source of supply of such heels, on or about May 19, 1933, to discontinue manufacture and shipments of heels with a red circular mark; that the Essex Rubber Company, from about June 6, 1933, until June 29, 1934, manufactured and supplied to the Defendant rubber heels bearing a circular orange colored mark; and that the Defendant during this period of time from May, 1933 until this latter part of June, 1934, continued to sell heels bearing red circular marks and also heels bearing orange circular marks, which sometimes became indiscriminately mixed together in the same bins and on the same counters.

[fol. 300] (c) That the Plaintiff replied upon the letter of the Defendant, dated May, 1933, to cease infringement of its trade mark and did not learn of the continued use

by the Defendant of the red circular mark until the early part of 1934.

(d) That the Plaintiff again notified the Defendant of infringement under date of February 15, 1934 and June 14, 1934 the Plaintiff proceeded to make an investigation of types of heels sold in the Defendant's stores and again, under date of June 14, 1934, called the matter of infringement to the attention of the Defendant, at which time the Defendant replied that the Essex Rubber Company was undoubtedly using up its old stock of heels bearing the red circular mark.

(e) That, under date of June 29, 1934, the Defendant, by letter, notified the Essex Rubber Company to discontinue the delivery of all kinds of heels to the Defendant until the Essex Rubber Company straightened out its difficulty with the Mishawaka Company.

(f) That such heels so delivered to the Defendant by the Essex Rubber Company and sold by the Defendant, in addition to the red or orange circular mark bore the trade-mark "Crusader", and embossed on the outer face of the circular mark was a Crusader's head or a head in armor and the heel bore the name S. S. Kresge Company in embossed rubber.

(g) That, during the period from July 1 to September 1, 1934, the Essex Rubber Company was engaged in changing its molds and thereafter supplied to this defendant heels bearing a mark consisting of an indented diamond shape insert having a Crusader's head embossed thereon, the insert being of a color contrasting to the body of the heels and such heels bearing the trade-mark "Crusader", the heel bearing the name S. S. Kresge in embossed rubber.

(h) That, from July 1, 1934 to December 1, 1934, the Defendant purchased from the O'Sullivan Rubber Company, Inc., heels having on the tread surface a circular Indian head in the color red and bearing the trade-mark "Sure-Foot"; that such heels bearing the trade mark "Sure-[fol. 301] Foot" with the red Indian head embossed on the tread surface thereof were sold by the Defendant from July, 1934 until the bringing of this action; that some of such heels bore on the tread surface in embossed rubber the word 'Gettysburg, Pa.'

(i) That such heels bearing the red Indian head embossed thereon were in some stores sold from bins and counters on which were displayed and from which were sold heels having the orange "Crusader" mark.

(j) That, about December 1, 1934, the Defendant requested the O'Sullivan Rubber Company to change the color of the Indian head mark from red to green and thereafter sold heels bearing the green circular Indian head mark from the same bins and from the same counters in which and on which were displayed and offered for sale heels bearing the orange circular mark of the "Crusader" type and the red circular mark of the Indian head type and the indented diamond shaped "Crusader" head type.

(k) That, subsequently, to notice by the plaintiff, the defendant in addition to displaying and selling heels bearing a red circular mark, also displayed and sold heels bearing circular figures in orange, green, yellowish tan, and also figures with a square or diamond shape block in yellow and these heels were displayed on the defendant's counters and sometimes became indiscriminately mixed with heels bearing a red circular mark.

2. That Section IV of the Amended Findings of Fact, beginning on pages 6, be changed to read, as follows:

The following findings of fact requested by the Defendant are allowed, to-wit:

(a) There is no direct testimony that the Defendant, S. S. Kresge Company, its agents and employees, did and there is testimony that they did not attempt to palm off in any instance its heels as the heels manufactured by the plaintiff company.

(b) I find that there is no proof that any purchases of heels from the defendant, S. S. Kresge Company, was [fol. 302] motivated by a belief on the part of the purchaser that he was getting plaintiff's product but there is reasonable likelihood that some may have.

(c) There is no direct proof that the plaintiff, Mishawaka Rubber Company has lost sales as the result of purchases made from the defendant, S. S. Kresge Company, of either the Crusader heel or the Sure-Foot heel with the trade-mark in the color red.

(d) That the replacement heels offered for sale by the defendant, S. S. Kresge Company, when placed by them upon their counters were never indiscriminately displayed together but were customarily and usually arranged in such a manner as to display a variety of the colored inserts to the prospective purchaser and without emphasizing any colored insert over any other colored insert, and in each instance segregating and massing particular colors together in order to provide an attractive display of the articles but there is proof that subsequently some of these heels became indiscriminately mixed.

(e) That nearly all of the rubber heels which were on display in the S. S. Kresge Company stores covered by plaintiff's affidavits have borne in addition to the colored marks identifying trade marks, symbols or other indicia which further indicates that the heels being offered for sale by the S. S. Kresge Company were not the heels manufactured by the plaintiff.

(f) That paragraph four of the Findings of Fact be supplemented by this additional paragraph:

The proofs indicate, however, that the use of an embedded circular plug of contrasting color in a rubber heel had been previously used by a manufacturer of replacement heels as early as the year 1905.

(g) To delete from line 4 of paragraph 8 on page 3 the following words—'and the Boston Woven Hose & Rubber Company'—or in lieu thereto to make the following findings:

[fols. 303-312] That none of the heels supplied by the Boston Woven Hose & Rubber Company with a circular trade mark centrally located thereon used a red or reddish color and therefore did not infringe upon plaintiff's trade mark.

(h) To add to paragraph 9 of page 3, the following:

There is, however, in the record no direct proof of any ordinary purchaser being misled into believing that heels marketed by the defendant were products of the plaintiff company.

(j) That the round red ball registered by plaintiff as its trade mark simulates the Japanese flag and is identical to the round red ball or 'rising sun' portion thereof.

(j) To supplement paragraph V of the Findings of Fact on page 2 by the following additional paragraph:

However, the red circular ball figure is never used alone on rubber heels of plaintiff; said rubber heels, like those illustrated on the back cover page of plaintiff's Exhibit No. 10 and on page 39 of said Exhibit, bore, in addition to the red circular trade mark the words 'First Quality Ball Band' over the red circular mark, and the words 'Trade-Mark, Rubbers, Mishawaka, Ind.' Under the red circular mark.

Arthur F. Lederle, United States District Judge.

Approved as to form:

Wm. B. Giles, Attorney for Defendant. Thos. S. Donnelly, Attorney for Plaintiff.

Dated this 27th day of November, 1939.

* * * * * * *

[fols. 313-321] In United States District Court

Affidavit Accompanying Defendant's Motion to Settle Decree—Filed December 13, 1939

State of Michigan,
County of Wayne, ss:

William B. Giles, first being duly sworn, deposes and says upon oath that he is the attorney for the defendant in the above entitled cause in charge of litigation;

That by letters dated February 18, 1937, March 8, 1937, April 7, 1937, all to Eugene M. Giles, and by letter of March 21, 1938, to Thomas S. Donnelly, defendant offered to consent to a permanent injunction in accordance with the terms in the preliminary order of August, 1935, which included permanent injunction restraining defendants from the sale of rubber heels with a circular red, reddish or orange mark thereon;

That the said offer of compromise was declined.

Further, deponent sayeth not.

(S.) Wm. B. Giles.

Subscribed and sworn to before me this 12th day of December, 1939.

(S.) Juanita Elkington, Notary Public, Wayne County, Michigan.

My commission expires, Sept. 5, 1943.

* * * * * * *

[fol. 322] IN UNITED STATES DISTRICT COURT

COURT'S DECREE—Filed December 29, 1939

Findings of Fact and Conclusions of Law and Amended Findings of Fact having been filed by the Court.

Now, Therefore, in consideration of the premises,

It Is Ordered, Adjudged and Decreed that the defendant, S. S. Kresge Company, a Michigan corporation, its officers, attorneys, agents, servants and employees, and each and all of them, be and they are hereby restrained and enjoined from:

A—Selling or offering for sale or aiding and abetting others, either directly or indirectly, in selling or offering for sale rubber heels bearing the ornamental dress of the [fols. 323-329] Heels of plaintiff herein, as exhibited to this Court, consisting of any red or reddish circular ball figure appearing on the face portion of the heel, or any imitation thereof so nearly resembling the ornamental dress of the heels of plaintiff as to be calculated to deceive the ordinary purchaser as to the source of such goods.

It Is Further Order-, Adjudged and Decreed that the defendant account to the plaintiff for profits unlawfully derived from those sales made by the defendant after May 19th, 1933, of rubber heels bearing a red or reddish circular mark indented upon the face portion thereof to purchasers who were induced to buy because they believed the heels to be those of plaintiff and which sales plaintiff would otherwise have made.

It Is Further Ordered, Adjudged and Decreed that costs properly taxable be allowed to plaintiff for proceedings prior to April 7th, 1937, and that for proceedings thereafter costs be taxed against the plaintiff in favor of the defendant.

Dated this 29th day of December, A. D. 1939.

(S.) Arthur F. Lederle, United States District Judge.

• • • • • • •

[fols. 330-338] IN UNITED STATES DISTRICT COURT

ORDER AMENDING DECREE

It is hereby Ordered that the decree entered herein on December 29, 1939, be, and it is hereby amended by striking therefrom the last paragraph.

It is further Ordered that the matter of costs await the disposition of the accounting herein.

(S.) Arthur F. Lederle, District Judge.

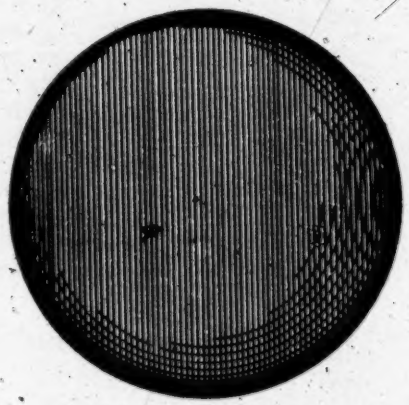
TRADE-MARK.

No. 36,471. Registered May 28, 1901.

MISHAWAKA WOOLEN MANUFACTURING CO.

CERTAIN NAMED BOOTS, SOCKS, RUBBER GOODS, WOOL GOODS, AND CLOTHING.

(Application filed Apr. 9, 1900.)



Renewed to
Mishawaka Rubber and Woolen Manufacturing Company. a corporation of Indiana. by change of name.

UNITED STATES PATENT OFFICE.

MISHAWAKA WOOLEN MANUFACTURING CO., OF MISHAWAKA, INDIANA.

TRADE-MARK FOR CERTAIN NAMED BOOTS, SOCKS, RUBBER GOODS, WOOL GOODS, AND CLOTHING.

STATEMENT and DECLARATION of Trade-Mark No. 36,471, registered May 28, 1901.

Application filed April 9, 1898.

STATEMENT.

To all whom it may concern:

Be it known that the MISHAWAKA WOOLEN MANUFACTURING CO., a corporation duly organized under and existing by virtue of the laws of the State of Indiana, and engaged in business with its principal office and business location at Mishawaka, in the county of St. Joseph, in said State, has adopted for its use a Trade-Mark for Wool Boots, (both Knit and Felt,) Lumbermen's Socks, Rubber Boots and Shoes, and for Boots Formed Partially of Rubber and Partially of Wool, as well as for Robes, Blankets, and Clothing Made of either Wool, Cotton, or Rubber or of either Wool or Cotton Combined with Rubber, of which trade-mark the following is a full, clear, and exact statement or specification.

Said trade-mark consists of the arbitrarily-selected representation of a circular figure or ball colored red. While thus referring to the use of red color in connection with said representation of a circular figure or ball, this has been done with the understanding that the color thus indicated is of such scope as not to be confined to any special shade of red, but includes the darker as well as the lighter shades of said color, which shades when accurately described are known by other names—of red warp on a web used for such straps, having a ground of dark color. When applied to rubber boots and shoes and to combination boots formed partially of rubber and partially of wool, such trade-mark is usually stamped on the bottom of the heel portion thereof in red color, either by the direct application of such color to the rubber surface of the heel or by having such color on a separate circular surface, which is secured to the sole of the heel by adhesion. When thus applied to the heel of a rubber boot or shoe, it is usual to cast upon or into such heel a circle within which appears said colored representation of a ball or circular figure.

It is also the custom of said company to have said trade-mark appear on the front of the legs of the rubber boots of its manufacture, including the combination boots formed of rubber and wool, the same being usually located near the top and preferably in front.

When said trade-mark is employed with robes, blankets, and clothing made either entirely of wool, cotton, or rubber or of a combination of wool, cotton, or rubber, it is usually applied to the inside of the neckband of said robes or other clothing by weaving by the employment of red warp with webbing of dark color, while it is likewise applied to

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In the facsimile filed herewith is shown said trade-mark as used when applied to the straps of wool boots of said company's manufacture, but of enlarged proportions. While such facsimile is in india-ink, it is, as stated, the preference of said company to employ red color for such representation of a circular figure or ball.

When said trade-mark is applied to wool boots of said company's manufacture, it is usual to have the same appear on one or both of the straps of such boots, the application thereto being by weaving, by the employment of red warp on a web used for such straps, having a ground of dark color. When applied to rubber boots and shoes and to combination boots formed partially of rubber and partially of wool, such trade-mark is usually stamped on the bottom of the heel portion thereof in red color, either by the direct application of such color to the rubber surface of the heel or by having such color on a separate circular surface, which is secured to the sole of the heel by adhesion. When thus applied to the heel of a rubber boot or shoe, it is usual to cast upon or into such heel a circle within which appears said colored representation of a ball or circular figure.

It is also the custom of said company to have said trade-mark appear on the front of the legs of the rubber boots of its manufacture, including the combination boots formed of rubber and wool, the same being usually located near the top and preferably in front.

When said trade-mark is employed with robes, blankets, and clothing made either entirely of wool, cotton, or rubber or of a combination of wool, cotton, or rubber, it is usually applied to the inside of the neckband of said robes or other clothing by weaving by the employment of red warp with webbing of dark color, while it is likewise applied to blankets by weaving by the use of red warp. The particular method of applying said trade-mark, consisting of the representation of a ball or circular figure, as well as the location where applied, may be varied, as the essential and paramount feature of such trade-mark consists of the arbitrarily-selected representation of a circular figure or ball colored red. The purpose sought is to employ a color sufficiently distinctive to produce an impression upon the eye which will be retained by the memory.

Said company frequently associates said trade-mark with the word-symbol or compound word "Ball-Band," which word is used as an additional distinguishing mark or brand for its goods and constitutes a separate trade-mark, which may be used alone or in connection with said trade-mark consisting of the representation of a circular figure or ball, as may be desired or preferred. It does not,

however, in any way or to any extent wish to limit or abridge any rights for which it may now be entitled to protection arising from any of the added features which have been by it associated with said trade-mark, consisting of the representation of a circular figure or ball colored red, and which have become known to its trade in connection therewith. Said trade-mark word as employed by it is also printed upon labels, bill-heads, letter-heads, and in other advertisements for use in connection with its trade, which labels and advertisements contain in addition the name of said company, the place of manufacture, and other advertising and descriptive matter pertaining to such manufacture.

The class of merchandise to which said trade-mark is applied is boots, socks, rubber goods, wool goods, cotton goods and clothing, and the particular description of the goods comprised in such class upon which said trade-mark is used is wool boots, lumbermen's socks, rubber boots and shoes, combination boots formed of rubber and wool, and robes, blankets, and clothing, made either of wool or cotton, or rubber, or by the combination of wool or cotton and rubber.

While it is the method and practice of said company to apply said trade-mark as hereinbefore mentioned, the same may be otherwise employed by being stenciled, stamped, branded, or painted on the boxes containing the goods of its manufacture, or may be otherwise affixed to said goods or packages thereof, or may be used in any other manner or way calculated to designate such goods as being of its manufacture and to cause the same to be known to the trade and the public by the employment of said trade-mark, or the same may be otherwise used to guard against fraudulent imitations or deceptions.

Said company intends to use said trade-mark in every lawful manner at will, as may be deemed expedient.

This trade-mark was first adopted on or about the 15th day of October, 1891, and has been continuously used by this corporation since said date for the purposes aforesaid.

Dated March 28, 1898.

MISHAWAKA WOOLEN MANUFACTURING CO.,
By MARTIN V. BEIGER,
President.

Witnesses:
J. M. REESE, Jr.,
CLARENCE E. MCCOLLUM.

DECLARATION.

State of Indiana, county of St. Joseph, ss:

MARTIN V. BEIGER, being duly sworn, deposes and says: that he is president of the corporation named in the foregoing statement; that he verily believes that the foregoing statement is true; that said corporation has at this time a right to the use of the trade-mark therein described; that no other person, firm or corporation has the right to such use either, in the identical form or in any other such near resemblance thereto as might be calculated to deceive; that it is used by said corporation in commerce between the United States and foreign nations or Indian tribes, and particularly with the Dominion of Canada; that the description and facsimile presented for record truly represent the trade-mark sought to be registered, and that he and the other officers, directors and stockholders of said corporation are citizens of the United States.

MARTIN V. BEIGER.

Subscribed and sworn to before me this 28th day of March, A. D. 1898.

[L. S.] EVERETT G. EBERHART,
Notary Public.

[fol. 339] PLAINTIFF'S EXHIBIT No. 21

Abstract of Title of Plaintiff's Registration No. 36,471

(Mishawaka vs. Kresge)

386

United States Department of Commerce, Patent Office

To all persons to whom these presents shall come, Greeting:

This is to certify, That the annexed is a true copy from the Digest of this Office of all Assignments, Agreements, Licenses, Powers of Attorney, and other instruments of writing, found of record up to and including April 8, 1935 that may affect Trade Mark registered by Mishawaka Woolen Manufacturing Co., Mishawaka, Ind.

Trade-Mark No. 36,471 registered May 28, 1901.
(Renewed May 28, 1931 to Mishawaka Rubber and Woolen Manufacturing Company, Mishawaka, Ind., a Corporation of Indiana, by change of name).

Searched from February 14, 1893.
Instrument dated Jan. 9, 1923.
Recorded Feb. 11, 1924. Liber F-121. Page 126.

Secretary of State
Indiana,

Change of Name of
Mishawaka Woolen Manufacturing
Company,
to
Mishawaka Rubber and Woolen
Manufacturing Company.

No Inventions, Letters Patent or Trade-Marks mentioned.

Certified copy of Transcript of Decree of Court filed September 18, 1923 in the office of said Secretary, changing the name of Mishawaka Woolen Manufacturing Company to Mishawaka Rubber and Woolen Manufacturing Company.

In testimony whereof, I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the [fols. 340-361] City of Washington, this twentieth day of

April, in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States of America the one hundred and fifty-ninth.

(Signed) Conway P. Coe, Commissioner of Patents.
(Seal.)

Attest:

(Signed) Harry C. Spielman, Acting Chief of Division L.

PLAINTIFF'S EXHIBIT No. 22

Certified Copy of Plaintiff's Articles of Association and Amendment Changing Its Name

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[fol. 362] PLAINTIFF'S EXHIBIT No. 127

Plaintiff's 1933 Correspondence with Defendant

(Mishawaka v. Kresge)

Mishawaka Rubber & Woolen Mfg. Co.,
Mishawaka, Indiana

May 5, 1933.

S. S. Kresge Company, 2727 Second Boulevard, Detroit, Michigan.

GENTLEMEN:

We have in our possession a rubber heel that was purchased at one of your stores and which bears a red circular figure mark and the name "Crusader".

We have for a great many years used a red circular figure as our trade-mark on footwear including rubber heels on which our mark appears in substantially the same location as the red circular mark on your heels. This red circular mark that you are using is undoubtedly an infringement of our trade-mark and we accordingly demand that you discontinue at once putting out rubber heels with the red circular figure mark. Unless you comply

immediately with this request and satisfy us that you have have done so, we will hold you accountable for damages.

Please let us have a prompt reply.

Yours very truly, Mishawaka Rubber & Woolen Mfg. Co., (Signed) E. J. W. Fink, President & General Manager.

EJWF:VM.
Registered.

* * * * * * *

[fol. 363] S. S. Kresge Company
General Offices,
Detroit, Michigan

May 9, 1933.

Legal Department, Mishawaka Rubber & Woolen Mfg. Co., Mishawaka, Indiana.

Atten.: Mr. E. J. W. Fink. Re: "Crusader" Rubber Heels

DEAR SIR:

Your letter of May 5th is referred to this department.

Mr. Murphy is out of the city at the present time and upon his return will give this matter his immediate attention. In the meantime our manufacturers have been advised as to the contents of your letter.

Very truly yours, S. S. Kresge Company, (Signed) N. Dickinson, Secretary to E. A. Murphy.

ND
5-23-33.

Mishawaka Rubber & Woolen Mfg. Co.,
Mishawaka, Indiana

May 11, 1933.

S. S. Kresge Company, Detroit, Michigan.

Re: Crusader Rubber Heels

GENTLEMEN:

Your letter of May 9 in reply to ours of May 5 has been received, in which it is indicated that we will hear from your Mr. E. A. Murphy upon his return.

Yours very truly, Mishawaka Rubber & Woolen Mfg. Co., (Signed) E. J. W. Fink, President & General Manager.

EJWF:VM.

* * * * * * *

[fol. 364] S. S. Kresge Company

General Offices

Legal Department

Detroit, Michigan,
May 19, 1933.

Mishawaka Rubber & Woolen Mfg. Co., Mishawaka, Indiana.

Att.: Mr. E. J. W. Fink, President & General Manager

DEAR SIR:

Your letter of May 5th came during the writer's absence from the City. The writer has before him a sample of the Crusader heel with an embossed knight head and inasmuch as your trade-mark is a flat circular red disk, I am wondering if we are talking about the same device. I can hardly understand how anyone by the widest stretch of the imagination would confuse one with the other. This company of course will not sanction the sale of merchandise which infringes other trade-marks and apart from this we desire to maintain friendly relations with your company. After studying our letter very carefully we reached the conclusion that your objection is to the use of the color red. While I am sure that you understand that a trademark gives no exclusive right to colors, we are entirely agreeable to requesting our manufacturers to use some other color unlike red. We will proceed accordingly upon your reply.

Very truly yours, S. S. Kresge Company, (Signed)
E. A. Murphy—Ass't Sec'y.

EAM:ND
6-2-33.

[fols. 365-405] Mishawaka Rubber & Woolen Mfg. Co.,
Mishawaka, Indiana

May 25, 1933.

S. S. Kresge Company, Detroit, Michigan.

Attention: Mr. E. A. Murphy, Assistant Secretary

GENTLEMEN:

We have your letter of the 19th which is in reply to our trade-mark infringement notice of May 5, and we feel quite

sure you understand that the red Crusader mark mentioned in your letter is the mark complained of and that you probably realize that it is an infringement of our mark.

We understand from the last sentence of your letter that upon receipt of our reply you will change the red Crusader mark, and we shall expect you to do this promptly and in such a way that there will be no further possibility of conflict with our mark.

Yours very truly, Mishawaka Rubber & Woolen Mfg. Co., (Signed) E. J. W. Fink, President & General Manager.

EJWF:VM.

. . . . . .

[fol. 406] PLAINTIFF'S EXHIBIT No. 134

Plaintiff's 1934 Correspondence

Mishawaka Rubber & Woolen Mfg. Co.,

Mishawaka, Indiana

February 15, 1934.

S. S. Kresge Company, 2727 Second Boulevard, Detroit, Michigan.

GENTLEMEN:

Having in mind our correspondence of last May relative to your selling rubber heels bearing a mark which, in our opinion, plainly infringed our trade-mark, we have been very much disturbed to find such heels still being offered for sale in your stores.

We dislike to appear at all brusque or arbitrary, but we must insist that proper respect be given our rights in this matter, and we therefore ask for a definite statement from you.

Yours very truly, Mishawaka Rubber & Woolen Mfg. Co., (Signed) E. J. W. Fink, President & General Manager.

EJWF:VM.

[fol. 407] S. S. Kresge Company,
General Offices,
Detroit, Michigan

Office of J. L. Pickering, Jr.

February 16, 1934.

Mishawaka Rubber & Woolen Mfg. Co., Mishawaka, Ind.

GENTLEMEN:

We have your letter of February 15th, and would appreciate a sample of the heel in question.

To the best of our knowledge and belief, we have no insert on our counter that could in any possible way infringe on your trade-mark.

An early receipt of the article mentioned would be appreciated, together with a letter from you as to how it infringes.

Yours very truly, S. S. Kresge Company, (Signed) J. L. Pickering, Jr., Buyer.

JLP:W.

[fol. 408] Mishawaka, Rubber & Woolen Mfg. Co.,
Mishawaka, Indiana,

June 14, 1934.

S. S. Kresge Company, Detroit, Michigan

GENTLEMEN:

On May 5, 1933 we notified you of our objection to your use of a red circular figure on rubber heels that we found you were displaying and selling in your stores, and we indicated that the heels we had reference to also bore the name "Crusader." We advised you in that letter that we considered said red circular mark on your heels an infringement of the red circular figure trade-mark that we had been using for a great many years on our footwear and rubber heels, and we demanded that you discontinue at once putting out rubber heels with the red circular mark, stating that unless you complied immediately with our request and satis-

fied us that you had done so, we would hold you accountable for damages.

After several weeks' delay, we received a letter from you signed by Mr. E. A. Murphy, stating that you were entirely agreeable to requesting your manufacture-s to use some other color unlike red and that you would proceed accordingly upon our reply, and we replied on May 25, 1933, stating that we understood from your letter that upon receipt of our reply you would change the red Crusader mark and that we would expect you to do this promptly and in such a way that there would be no further possibility of conflict with your mark.

We found, however, that your stores continued to display and sell rubber heels bearing the red circular mark that we had complained of and that together with the red marked heels your stores were displaying and selling rubber heels with the same mark in other shades in addition to red and varying through pink orange to a yellow color, and we wrote to you on February 15, 1934 calling you- attention to your continued infringement and insisting that you respect our trade-mark rights and asking for a definite statement from you. In reply we received a letter from you dated February 16, 1934 and signed by Mr. J. L. Pickering, Jr., buyer, from which it appeared that he had not even looked up the previous correspondence referred to in our letter, as he asked [fol. 409] us to furnish him with a sample of the heel in question, which had been clearly identified in the previous correspondence, and merely informed us that to the best of your knowledge and belief you had no insert on your counter that could in any possible way infringe on our trade-mark.

In view of this attitude, we have proceeded to collect from your stores throughout the country samples of the heels bearing the red mark which even now are being displayed and sold in your stores, and we have also collected samples of heels bearing the mark in the varying shades from red to yellow, all of which we regard as objectionable and all the more so as they have been and are mixed in with the red mark so that they have the same significance as to origin as the heels bearing the red mark.

We now demand that you discontinue immediately the display and sale of rubber heels bearing circular marks in red, pink, orange, yellow or any other colors in which you have been or are using such marks, and we also require that

you account to us for the damage we have sustained on account of your infringement of our rights.

We will expect a prompt reply.

Yours very truly, Mishawaka Rubber & Woolen Mfg. Co., (Signed) E. J. W. Fink, President & General Manager.

EJWF:VM.

Registered: Return Receipt Requested.

[fol. 410] S. S. Kresge Company

General Offices

Office of J. L. Pickering, Jr.

Detroit, Michigan,
June 18, 1934.

Mishawaka Rubber & Woolen Mfg. Co., Mishawaka, Ind.

GENTLEMEN:

We have your letter of June 14th, and assumed that this matter was straightened out to your satisfaction some time ago when Essex Rubber changed all of their dies around from the old ones. We understood that this — result of a conference with your company.

Inasmuch as we are purchasing rubber heels from others than Essex, of different designs, there is a possibility that Essex is using up old stock before making up the new number. However, we will write the Essex people to get the exact status of the situation.

Yours very truly, S. S. Kresge Company, (Signed) J. L. Pickering, Jr., Buyer.

JLP:W.

[fol. 411] Mishawaka Rubber & Woolen Mfg. Co.

Mishawaka, Indiana

June 22, 1934.

S. S. Kresge Company, Detroit, Michigan.

GENTLEMEN:

We have your letter of June 18, which we consider an unsatisfactory and incomplete response to our letter of June 14 to you regarding your continued infringement of our trade-mark.

We have had no dealings or understanding whatsoever with the Essex Rubber Company regarding this matter, although we are advised that they represented to the Patent Office that they had some agreement with us, which, however, we know nothing about. Moreover, regardless of any understanding that you may have had concerning changes that Essex may have proposed to make in their dies, you have continued to display and sell heels bearing the mark complained of after repeated notices from us of our objection.

Under these circumstances we would like to know if your letter of June 18 is all the response you care to make to our letter of June 14.

Yours very truly, Mishawaka Rubber & Woolen Mfg. Co., (Signed) E. J. W. Fink, President & General Manager.

EJWF:VM.

[fol. 412] S. S. Kresge Company

General Offices

Office of J. L. Pickering, Jr.

Detroit, Michigan,
June 25, 1934.

Mishawaka Rubber Co., Mishawaka, Wis.

GENTLEMEN:

We wired Essex Rubber Co. last week, advising them that you were still complaining the manufacture and sale of the heel, which you claim is an infringement on your copyright. They wired back that they expected to have new dies made within two weeks.

This is exactly contrary to our understanding with the Essex Rubber Co., inasmuch as it was our impression that this had happened over a month ago.

We are writing all stores today to discontinue ordering rubber heels from the Essex Rubber Co. until further notice. Please advise if this is satisfactory and in line with your conclusions.

Yours very truly, S. S. Kresge Company, (Signed) J. L. Pickering, Jr., Buyer.

JLP:W.

[fol. 413] S. S. Kresge Company

General Offices

Detroit, Michigan,
July 7, 1934.

Office of J. L. Pickering, Jr.

Mishawaka Rubber Co., Mishawaka, Wis.

GENTLEMEN:

We are attaching copy of a letter received from the Essex Rubber Co.

We note in their third paragraph regarding our influence with you people. We do not know what possible influence we have with your Company, but are forwarding copy of the letter for your disposition.

So far as the Kresge Company is concerned, we do not make our profit in our Legal Department, and inasmuch as you feel that the Essex product is an infringement on some copy right that you did have, or now have, we are certainly not interested in purchasing any more of these goods without your sanction. We must advise that if you state that it is all right to sell what remaining stock they have, that it will take from two to three months to clean this up.

As you know, this firm is in the hands of a receiver, and since they are evidently acting in good faith, it is our opinion that they should be permitted to close out what stock they have on hand of the number that you claim is an infringement. However, this is strictly up to you.

We would appreciate hearing your decision as soon as possible.

Yours very truly, S. S. Kresge Company, (Signed) J. L. Pickering, Jr., Buyer.

JLP—W.

[fol. 414] Essex Rubber Company

Trenton, N. J.

July 5, 1934.

S. S. Kresge Co., General Offices, Detroit, Mich.

Attention, J. L. Pickering, Jr.

GENTLEMEN:

We wish to acknowledge receipt of your letter of June 29th, and are following your instructions and withholding

shipments to your stores until such time as our new molds are finished which should be within the next two weeks.

We are enclosing, however, a list of the present type Crusader Heels, which we have in stock and as we are unable to use the heels for any other purpose, we will very much appreciate your allowing us to ship these on orders until they are cleaned up.

We had hoped that possibly the Mishawaka people would consent to allow us to market these heels in view of the fact that we were making a complete change in the appearance of this heel. We believe your influence with Mishawaka would cause them to feel that it would be to their advantage to allow you to take in these heels.

We sincerely hope that we can get this matter straightened out in a very short time and appreciate very much what you are doing to help us out.

With best personal regards, I am

Very truly yours, H. S. Maddock, Receiver of Essex Rubber Co., (Signed) J. A. Davidson.

[fol. 415] Mishawaka Rubber & Woolen Mfg. Co.

Mishawaka, Indiana

July 12, 1934.

S. S. Kresge Company, General Offices, Detroit, Michigan.

GENTLEMEN:

Your letter of June 25 addressed to Mishawaka Rubber Company, Mishawaka, Wisconsin, and your letter of July 7, likewise erroneously addressed, have reached us, and we wish to advise that we do not regard your letter of June 25 as a complete and satisfactory reply to our letter of June 14 to you. Moreover, it seems to us rather presumptuous, after our notice of infringement given to you considerably over a year ago and your continued deliberate infringement since that notice, for you to suggest to us in your letter of the 7th that the Essex Rubber Company should be permitted to close out the stock they have on hand bearing the infringing mark.

Furthermore, as far as we are concerned, the Essex Rubber Company has not exhibited any good faith that entitles them to any consideration. On the contrary, in an opposition proceeding that we instituted against them to prevent registration of the red Crusader mark under

which you have been putting out your heels, they refused to furnish our attorney with copies of papers that they filed in the case, although required by the rules and notified by the Patent Office that they should do so. In such cases the opposing attorney has access to the Patent Office files, and under the circumstances it would seem that ordinary courtesy would have prompted compliance with the rules.

*H*oreover, they persuaded the Patent Office to permit them to withdraw their application on representations made in August 1933 that the parties had reached an agreement with reference to their conflicting interests, which was not true, and upon the further representation that they no longer used the mark in red, which apparently was not true, [fol. 416] as the heels bearing the red mark have been on your counters until very recently at least, and in their letter of the 5th to you they want you to obtain permission from us to dispose of stock that they still have on hand.

Naturally, under these circumstances, we feel no inclination whatsoever to accommodate them.

The heels bearing the red Crusader mark first came to our attention in the early part of last year, and as they were being sold in your stores and bore your name, we notified you on May 5th, 1933 that we regarded your use of that mark on your heels as an infringement of our trademark and that unless you discontinued at once putting out rubber heels with the red circular figure mark, we would hold you accountable for damages, which we propose to do. You disregarded our notice and continued to infringe, and we proceeded to collect from your stores evidence of your continued infringement and demanded in our letter of June 14, 1934 that you account to us for the damage we have sustained on account of your infringement of our trademark.

Now you seek to dispose of the matter by merely discontinuing the objectionable mark after deliberately disregarding our notice for more than a year, and you even suggest that your manufacturer be permitted to dispose of his remaining stock, presumably through your stores.

Our mark is very valuable. We have used it for many years on goods amounting to many millions of dollars per year that have been distributed throughout the country, and we have spent millions of dollars in advertising and educating the public to identify our goods by the red mark.

That you have infringed and that your infringement has caused us a great amount of damage, there can hardly be any question. Your distribution of heels bearing the red mark has been widespread and prolonged, and those who identify our goods by the red mark—and there are many, as we sell through about sixty thousand stores—will naturally regard your red marked heels as our product, as well as any sort of shoes that your purchasers may put them on; and even though you discontinue the mark now, there undoubtedly will be many shoes in use for a considerable length of time bearing your red marked heels and continuing and increasing the damage to us.

[fol. 417] In view of your deliberate and prolonged infringement after notice and the large amount of damage that necessarily has been and will be occasioned by your infringement, we cannot consider or accept any mere discontinuance of infringement as sufficient. Therefore, this is final notice to you that unless you see fit to arrange with us before July 25 for a settlement that is satisfactory to us and which will involve a substantial payment of damages, we will take steps to have you declared an infringer and to collect damages to the full extent that we believe we are entitled and which we feel confident that the Courts, under the circumstances, will award to us.

Yours very truly, Mishawaka Rubber & Woolen Mfg. Co., (Signed) E. J. W. Fink, President & General Manager.

EJWF:VM.
Register.

Eugene M. Giles,
Attorney and Counselor,
2232-36 Midland Building,
176 West Adams Street,
Chicago

August 11, 1934.

S. S. Kresge Company, General Offices, Detroit, Michigan.

GENTLEMEN:

In their letters of June 14, 1934 and July 12, 1934, my client, Mishawaka Rubber and Woolen Manufacturing Company of Mishawaka, Indiana, made certain demands upon

you on account of your infringement of their round red trade mark. You not only have failed to comply with these demands, but have shown further indifference and disregard for my client's trade mark rights by displaying and selling [fol. 418] in your stores another rubber heel bearing a round red mark. The heel that I refer to has an Indian head design on the round red mark and the words "Sure Foot" molded on the bottom of the heels and is marked on the inside "Sure-Foot Heel & Rubber Co., Gettysburg, Pa." Samples of this heel were purchased in your stores as late as Wednesday of last week.

It is my opinion that this round red mark that you are using on the above mentioned "Sure Foot" heels is a clear infringement of my client's round red trade mark and you are hereby notified to discontinue immediately the display and sale of heels bearing that mark.

I have been instructed by my client to start suit against you and I have no doubt that your persistent and prolonged use of red circular marks on rubber heels will be regarded as a flagrant and wilful violation of my client's trade mark rights and that your further use of the round red mark on this "Sure Foot" heel will be looked upon as an added aggravating circumstance.

Yours very truly, (Signed) E. M. Giles.

EMG:MS.

[fol. 419] S. S. Kresge Company

General Offices

Legal Department

Detroit, Michigan,
August 31, 1934.

Eugene M. Giles, Attorney, 176 West Adams Street, Chicago, Illinois.

Re: Ball Band Trade-Mark, Mishawaka Rubber & Woolen Mfg. Co.

Dear Sir:

In regard to the Sure Foot Heel, I wish to leave no impression of questioning your good faith, but I assume you are familiar with the provisions of the Fair Practice Code

and the penalties therein imposed in respect to intimidatory trade practices.

I mention this for the reason that we have certain letters from your client of a threatening character, which letters state that any trade mark with a circular background constitutes a clear infringement of your client's Ball Band Trade Mark, regardless of the color used, wording of the trade mark or character of the design.

I will appreciate your personal reasons for believing that the Sure Foot Trade Mark constitutes an infringement of the Ball Band Trade Mark.

Very truly yours, S. S. Kresge Company. (Signed) E. A. Murphy, Ass't Sec'y.

EAM:K.

[fols. 420-434]

Eugene M. Giles

Attorney and Counselor

2232-36 Midland Building

176 West Adams Street

Chicago

September 11, 1934.

S. S. Kresge Company, General Offices, Detroit, Michigan.

Attention: Mr. E. A. Murphy, Ass't. Sec'y.

Re: Mishawaka Rubber & Woolen Mfg. Co. v. Kresge Company

Dear Sir:

Referring to your letter of the 31st ult. in which you refer to the Fair Practice Code, I am not aware of any Code or other regulations relating to the giving of notice by a trade mark owner to those whom it regards as infringers of its mark. I am aware that some, at least, of the codes for various industries include trade mark infringement as a violation of the Code, but upon investigation and inquiry I have been unable to locate the Code provisions that you refer to. I would appreciate it therefore if you would let me know just what Act and part thereof you have reference to.

With respect to the notices that have been sent to you by my client, these were sent under my direction and I am quite willing to take full responsibility for them. These letters did not make any such broad statement as you have indicated in your letter, but they did point out what you have done that is regarded as improper and which we will endeavor to establish as improper to the satisfaction of the Court in the action that will be instituted against you. I advised you in my letter of August 11th that I have instructions to proceed against you and the bill of complaint is being prepared and will be filed as promptly as possible. The red circular mark on the Sure Foot heel will be included as part of your alleged infringement.

Yours very truly, (Signed) E. M. Giles.

EMG:MS.

[fol. 435] In United States Circuit Court of Appeals for the Sixth Circuit

Cause Argued and Submitted

(March 13, 1941—Before: Hicks, Hamilton and Martin, JJ.)

This cause is argued by Thomas S. Donnelly for Appellant and by William B. Giles for Appellee and is submitted to the court.

In United States Circuit Court of Appeals

Judgment—Entered April 18, 1941

Appeal from the District Court of the United States for the Eastern District of Michigan

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 436] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed April 18, 1941

Before Hicks, Hamilton and Martin, Circuit Judges.

Hamilton, Circuit Judge: Appellant, Mishawaka Rubber and Woolen Manufacturing Company, filed a complaint against the appellee, the S. S. Kresge Company, for trade-mark infringement and unfair competition. The court found for appellant, but it claims the relief granted was inadequate and on this appeal it asks that the judgment be extended to award it further and other relief.

For many years appellant has been engaged in the manufacture, sale and distribution of footwear of various kinds and for more than thirty-five years, has been manufacturing rubber heels for use on its boots and shoes. Continuously since 1898, appellant has used a trade-mark which it registered in 1901 for its goods, consisting of an arbitrarily selected representation of a circular figure or colored ball of varying shades of red applied directly to the tread face at approximately the center of the rubber heel. It has renewed the registration of its trade-mark from time to time and is presently using it.

Since 1917 it has exemplified its trade-mark by embedding a circular plug of contrasting colored rubber in the heels of shoes sold by it of the same thickness of the heel so that the distinctive marking remained on the product during its life. In combination with the colored circular ball figure, appellant also used other registered trade-marks consisting generally of the words "Ball Band" or sometimes "Mishko" in raised lettering and also at bottom the lettering "Mishawaka, Indiana." The circular mark and the words "Ball Band" were associated together in different ways, the ball-shaped mark sometimes appearing between the words "Ball" and "Band" and sometimes being at the side of or above or below them. The words "Trade-Mark, Rubbers, Mishawaka, Ind." were always stamped under the colored circular mark. Mishawaka is the town in Indiana where appellant did its manufacturing.

[fol. 437] Appellant has spent, and is continuing to spend, large sums of money advertising in catalogs, pamphlets, newspapers and by window displays, its product under its

trade-marks, prominently displaying its colored circular figure as an identification of origin. Appellant's shoe heels have been sold throughout the United States always as a part of its shoes, never separately.

Appellee, the S. S. Kresge Company, operates and maintains a large number of retail stores throughout the United States where it sells detached rubber heels and lifts manufactured for it by the Essex Rubber Company, O'Sullivan Rubber Company and the Boston Woven Hose and Rubber Company. Those manufactured for it by the Essex Rubber Company had a red circular mark on the tread with the word "Crusader" in raised lettering and embossed in the outer face of the circular mark was a crusader's head or a head in armor.

On discovery that appellee was selling the above-described heels, appellant, on May 9, 1933, notified appellee that it was infringing its trade-mark and appellee, on May 19, 1933, informed appellant it intended using some color other than red on its heels and notified the Essex Company to discontinue the use of the red circular mark on the heels manufactured for it and from about June 6, 1933, to June 29, 1934, Essex manufactured and supplied appellee heels with a circular orange colored mark but from May, 1933, until June, 1934, appellee continued to sell heels with red circular mark, as well as those with orange circular mark indiscriminately mixed together on the same counters. Appellant again notified appellee of the alleged infringement on February 15 and also on June 14, 1934, and on June 29, 1934, appellee notified the Essex Rubber Company to discontinue delivery of heels to it. From June 1, to September 1, 1934, the Essex Rubber Company was changing its molds and thereafter supplied appellee with heels with and indented diamond-shaped insert with a crusader's head embossed thereon, the insert contrasting to the color in the body of the heel and having on it the word "Crusader." [fol. 438] The heels manufactured for appellee by the O'Sullivan Rubber Company, had on the tread surface an embossed circular Indian head in red with the words "Sure-Foot" in raised lettering thereon and these were delivered to appellee from July 1, 1934, to December 1, 1934, and sold by it from bins and counters on which were also displayed and sold heels having the red "Crusader" mark. After December 1, 1934, appellee requested the O'Sullivan Rubber Company to change the color of the circular Indian head

mark from red to green and thereafter appellee sold these heels bearing the green circular Indian head mark from the same bins and counters where there was displayed and offered for sale heels bearing the red circular mark of the "Crusader" type, the orange circular mark of the "Crusader" type and the indented diamond-shaped "Crusader" head type.

The heels made for appellee by the Boston Woven Hose & Rubber Company had an American eagle on a circular background on the tread surface, with the word "Ever-grip" embossed thereon but they did not use a red or reddish color.

The court below found that the heels manufactured for the appellee by the Essex Rubber Company and the O'Sullivan Rubber Company infringed appellant's trade-mark but that those manufactured by the Boston Woven Hose & Rubber Company did not so infringe. It also found that the method followed by appellee in the sale of its heels and lifts was unfair to appellant.

The court decreed that appellant be enjoined from selling, aiding or abetting others either directly or indirectly in selling rubber heels with a red or reddish circular ball figure appearing on the surface portion of the heel or any imitation thereof, so nearly resembling the ornamental dress of the heels of appellant as to be calculated to deceive the ordinary purchaser as to the source of such goods and it also decreed that appellee account to appellant for profits realized by it after May 19, 1933, on rubber heels bearing a red or reddish circular mark indented upon the face portion thereof, to purchasers who were induced to buy because they believed the heels to be those of appellant [fol. 439] and which sales appellant otherwise would have made.

Broadly stated, appellant attacks the decree in two particulars: (1) that the court should have enjoined the appellee from selling any heels with a disc of different color from the remainder of the heel; (2) that appellee should have been required to account for the profit on the sale of all heels with a distinctive colored disc regardless of any direct evidence of positive deception or whether or not appellant would otherwise have made the sales.

The registration of appellant's trade-marks did not enlarge its substantive rights. All it did was to confer jurisdiction on the court regardless of diversity of citizenship

and give registrant certain procedural advantages. *Armour & Company* v. *Louisville Provision Company*, 283 F. 42 (C. C. A. 6); *Armstrong Company* v. *Nu-Enamel Corp.*, 305 U. S. 315, 322.

Whatever substantive rights appellant may have in the premises arise under local law and are within the scope of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64; *Kellogg Company* v. *National Biscuit Company*, 305 U. S. 111. However, the parties make no claim that the local law is different from the general law on the subject and each has relied in the briefs almost entirely on Federal precedents.

A manufacturer may market his products in a dress in which there is no element of size, shape, color, lettering, word or symbol to which he has the exclusive right of use, but if the ensemble has come to be a public guaranty of origin and quality, he may secure protection against unlawful pirating by a competitor on the ground of unfair competition; *Shwannecke* v. *Genesee Coal Company*, 262 Mich. 624. In such a case, it is the duty of the court to examine the dress of the product in the original and that of the alleged pirate as a whole, both as to resemblances and differences to ascertain whether, in view of the differences, the resemblances are so marked that the ordinary purchaser would be likely to be deceived. The manufacturer may also put forth his product marked with an arbitrary symbol, lettering or figure and rely upon building up a good will [fol. 440] by associating in the public mind his product with the invented word or arbitrary symbol, and by thus using the marking acquire an exclusive right in it. *Smith* v. *Walker*, 57 Mich. 456. The symbol or marking of the manufacturer does not exist in gross or separate and apart from the good will with which it is associated but only attaches itself to the goods which it identifies and which goods are manufactured or sold by its owner.

An abstract right in a symbol has no existence, but the symbol must be considered in association with the article which it identifies. In this sense a trade-mark differs from a patent or copyright. The latter exist the instant either is issued or entered. The patentee or author, without use, remains the real or true owner of the grant until it is dedicated to the public use by abandonment or by operation of law, but the registry of a trade-mark does not ipso facto make the mark. Patent right and copyright rest upon the view that the results of the original labor of the inventor

and the author ought as a matter alike of justice and of public policy to be secured against piracy, while as regards the proprietor of a trade-mark, the question of originality does not arise so long as the mark is sufficiently distinctive really to identify his goods and for the purpose of registration to satisfy the Trade-Mark Act. In truth the registration of a trade-mark is rather the recognition of a fact than the grant of a privilege. The law of trade-marks is analogous to that of patents or copyrights in that each is based on one's rights to have guaranteed to him the profit derivable from his own property.

A "technical trade-mark" may be defined as a word, device or symbol lawfully appropriated by a manufacturer or trader to distinguish his specific products, the primary purpose of which is to indicate the origin of his goods and not to distingush a particular grade, style or size of the manufacturer's products. It must be capable of disinguishing one's articles from all others as regards origin or ownership. As to whether a commercial signature of one's [fol. 441] goods is a technical trade-mark is material here. Guilty knowledge or fraudulent intent is not an essential element of infringement of such a mark. It is well settled that an infringement will be restrained irrespective of the question of intent on the part of the infringer. *Saxlehner* v. *Siegel-Cooper Company*, 179 U. S. 42, 43. This is based upon the ground that the original proprietor has a qualified property right in the trade-mark, of which the pirate has made unlawful use.

The right to an injunction is not made to depend upon the fact that deception was either intended or practiced. If the opportunity is furnished where deception may ensue, a basis exists to grant injunctive relief. *Lawrence Mfg. Company* v. *Tennessee Mfg. Company*, 138 U. S. 537, 555. This rule, however, does not prevail in all cases in awarding either damages or cost. Proof of the absence of fraudulent intention in trespassing on trade-mark rights may avail a defendant in saving costs, damages or profits where his acts have been perfectly bona fide. The rule prevails in Michigan that an account of profits will not be taken where the wrongful use of a trade-mark or trade-name has been merely accidental or without any actual or wrongful intent to defraud the original owner or to deceive the public. *Liberty Oil Corporation* v. *Crowley, Milner Company*, 270 Mich. 187. This is in harmony with the rule prevailing in

the federal courts. *Straus* v. *Notaseme Company*, 240 U. S. 179, 181.

In many cases, it is difficult to determine whether complainant's trade-mark has been actually pirated in such manner as to be likely to deceive and impose upon his customers or patrons of his manufacture or business, but it is the duty of the court in all cases to compare the whole labels or symbols used by the respective parties, and if the court finds that the infringers' devices are colorable, which requires a careful inspection to distinguish his marks and appearances from those of the manufacture imitated, the court will protect the original owner, but is not bound to interfere where ordinary attention by the purchaser will enable him [fol. 442] to discriminate. The burden rests on complainant to show by a fair preponderance of the evidence that the ordinary mass of purchasers giving that attention which such persons usually give in buying the article in question would probably be deceived.

Where a person uses the business symbol or label of another with the fraudulent purpose of obtaining business which belongs to the other, there will be no injustice if the court assumes the label or symbol so chosen accomplishes the purpose although the resemblance is slight. If one intends that the name, symbol or label so chosen should be mistaken for that of another, it is fair to assume he will use them to promote that belief or purpose. Therefore the motives with which the name, symbol or label is chosen its similarity, as well as the surrounding circumstances, all enter into the determination of whether business will be lost or diverted. Where, however, the name, symbol or label is not chosen to deceive and has not been used in a way intended or calculated to deceive, the court should not interfere unless the similarity is sufficient to deceive the usual persons proceeding with ordinary care. *Supreme Lodge K. of P.* v. *Improved Order K. of P.*, 113 Mich 133. There is no finding of fact in the case at bar, and we find no evidence in the record to support the inference that appellee adopted the symbol used on its heels for the fraudulent purpose of attracting to itself business or sales which belonged to appellant and there is no evidence that any such sales occurred. The action is therefore limited to the charge that the defendant has infringed a technical trade-mark in violation of a qualified property right wherein the fraudulent intent is presumed. No justification is found in the

record for an inference that any one appears to have been deceived by appellee's trade-mark into purchasing its shoe heels and lifts in the belief that he was purchasing shoe heels produced by appellant.

Appellant's trade marks had been so long in use and so widely advertised, it is presumed that appellee had knowledge of them and even if the appellee assumed its trade-[fol. 443] marks without any intention to mislead the public or to unfairly interfere with appellant's trade, if they so closely imitated appellant's as to lead to confusion and tended, because of their similarity, to be taken by the public for those of appellant, appellee must be held to the same responsibility as though it had been guilty of intentional pirating. *Dayton* v. *Imperial Sales & Parts Company,* 195 Mich. 397.

It is the tendency of the courts to restrict the scope of law applicable to technical trade-marks and extend its scope in cases of unfair competition. *Mill Company* v. *Alcorn,* 150 U. S. 460; *Koehler* v. *Sanders,* 122 N. Y. 65. Appellant rests its cause of action both on the law of technical trade-marks and unfair competition. This being true, it becomes essential to ascertain the distinctions as well as the resemblance between the two legal principles. The underlying concept of each is the same; namely, the prevention of that which in its operation and results is a fraud upon the public and an injury to the rival trader. *Canal Company* v. *Clark,* 80 U. S. 311, 322. But, while the idea of fraud lies at the foundation of the law of technical trade-marks as well as that of unfair competition, it must be remembered that fraud may rest in actual intent shown by evidence or inferred from the circumstances or conclusively presumed from the act. Fraudulent intent must be shown by the evidence or be inferable from the circumstances in cases of unfair competition but where one uses the trade-mark or trade symbol of a competitor, fraud will be presumed from the wrongful use. No one has the right to use the technical trade-mark of another in connection with like goods but if he does and persists after being notified to desist, fraud and imposition, which constitute the essence of the injury, will be presumed and relief granted. *Lawrence Mfg. Company* v. *Tennessee Mfg. Company,* 138 U. S. 537, 549; *McLean* v. *Fleming,* 96 U. S. 245, 252; *H. E. Winterton Gum Company* v. *Auto Sales Gum & Chocolate Company,* 211 F. 612 (C. C. A. 6).

Appellant having acquired the exclusive right to the use upon its shoes of the trade-mark heretofore described, the [fol. 444] remaining question is: Would the coloring and markings of appellee's lifts and heels, excluded from the injunction, likely mislead the ordinary or usual buyer into believing that he was purchasing goods manufactured by appellant.

All of the heels manufactured by appellant had a red circular figure or red ball on the tread face in approximately the center thereof with the words "Ball Band" in raised lettering in different configurations and at the bottom thereof the lettering "Mishawaka, Indiana." All of appellee's heels, with the exception of two types, used the circular ball at first in red then in orange, green and beige but embossed on some of them were a Crusader's head, on some an Indian head, and on others an eagle. Appellant's heels had no arbitrary figure on them, but a circular contrasting, reddish section with accompanying lettering.

Color, except in connection with some definite arbitrary design which serves to distinguish the article as made or sold by a particular person, is not the subject of a trade-mark, but the owner of a valid trade-mark, otherwise distinctive, may be protected against appropriation by a rival through mere change in color. *Sampson Cordage Works* v. *Puritan Cordage Mills*, 211 F. 602 (C. C. A. 6). In considering the likelihood of confusion of goods where a trade-mark is a figure or design or lettering, the owner's right may well cover that figure or design or lettering reproduced in any color for the identity of the figure, design or lettering, may mislead the purchaser in spite of the difference in color. But, the difference in color may so emphasize the difference between the figure, design or lettering as to obviate the likelihood of deceiving any purchaser. If the trade-mark were a black cross, certainly one in bright red would distinguish them.

The words or phrases appearing on the respective marks here involved are so essentially dissimilar as to lend no color to deceit. Hence, obviously there can be no possibility of an confusion in sound between "Ball Band" and the words "Crusader," "Surefoot," and "Evergrip," so it is [fol. 445] clear that the lettering on the heels is not relevant to the issue here, and consideration must be confined to a comparison of the physical appearance of the two designs.

A circle or ball as a trade-mark is publici juris where it has not acquired a secondary meaning as in the case here and therefore appellant can claim no exclusive right to their use standing alone. *Patton Paint Company* v. *Sunset Paint Company*, 290 F. 323 (C. C. A. D. C.). The degree of resemblance necessary to constitute infringement is incapable of exact definition. All that courts of justice can do in that regard is to say that no manufacturer or seller can adopt a trade-mark so resembling that of another trader that ordinary purchasers buying with ordinary caution are likely to be misled and each case must be determined on facts peculiar to it.

In the case of a symbol merely, an imitation must be fairly exact to infringe. In cases where the trade-marks are the imprints of animals of the same genus, one large, fat and well conditioned, the other small, lank and lean, there is no actionable deceit. *Popham* v. *Cole*, 66 N. Y. 74.

In our opinion the symbols and lettering descriptive of the articles and bearing the names of appellant and appellee respectively as manufacturers or producers, are entirely unlike in arrangement, general form and appearance insomuch that no one could mistake the lifts and heels of appellee, excluded from the lower court's injunction, for those of appellant.

Where two persons are engaged in selling like goods, each of them may aptly designate and describe them or attractively present them for sale but neither may acquire the exclusive privilege of doing so, and neither has the right to insidiously mislead purchasers into the belief that his wares are those of his competitor. The products here involved have some family resemblance but do not show close kinship.

The right to the exclusive use of a technical trade-mark is limited to a use of it upon some particular class of goods. Accordingly, it is not an infringement to use the identical [fol. 446] trade-mark of another person upon an entirely different class of goods, but the owner of a trade-mark for a broad class, such as here, is entitled to enjoin the use of his work on a particular species of goods belonging to the class covered by the mark. But, before he is entitled to an accounting of profits for the use of his mark, the burden rests on him to show by a fair preponderance of evidence that either actual or reasonably probable de-

ception or confusion has resulted and regard must be given to the class of persons who purchase the articles and to the circumstances ordinarily attending their sale. From the circumstances of this case, there appears no reasonable probability that there was confusion or deception without evidence of the fact. Therefore, the burden was upon appellant to prove that appellee had made profits attributable in whole or in part to the use of appellant's trade-mark, even though they used identical or similar colors.

We agree with the District Court that the burden is upon appellant to prove that the appellee has made profits attributable in whole or in part to its trade-mark. *Westinghouse Manufacturing Company* v. *Wagner Manufacturing Company*, 225 U. S. 604, 622.

The injunction which was granted was expressly limited to prohibiting the use of any red or reddish circular ball figure appearing on the face portion of the heel, or any imitation thereof so nearly resembling the ornamental dress of appellant's heels as to be calculated to deceive the ordinary purchaser as to the source of the goods, and accounting was limited to profits unlawfully enjoyed by appellant from sales made by it after May 19, 1933, of rubber heels bearing a red or reddish circular mark indented upon the face portion thereof, to purchasers who were induced to buy because they believed the heels to be those of appellant and which sales appellant would otherwise have made.

The trade-marks of appellant were in part old and in part new, but for the purpose of presenting its goods to the public as identifying origin, it had the right to adopt the [fol. 447] combination it used and it is entitled to protection against palpable imitations and to the profits, if any, appellee has received by reason of the presumed palming-off of its goods as those of appellant. The case of appellant is not very strong on the facts, yet it seems to be entitled to the carefully limited injunction and accounting of profits which was granted.

The court in its judgment postponed the matter of awarding costs until the final disposition of the decreed accounting. Appellant asked us to amend the judgment by awarding it costs. The Rules of Civil Procedure, Rule 54, Title 28, U. S. C. A., following Section 723 (c) provides that costs shall be allowed as of course to the prevailing party unless the court otherwise directs.

By the plain language of the rule, the imposition of costs is a matter within the discretion of the trial court. Since the judgment is not final in this respect, we pass it. Appellant, deeming itself prejudiced by the error, if any, may get redress through application to the lower court for a modification of its judgment and afterwards if it deems itself aggrieved, he may appeal to this court for a review of the court's final judgment.

Judgment affirmed.

[fols. 448-466] Petition for rehearing covering 18 pages, filed May 17, 1941, omitted from this print. It was denied, and nothing more by order of June 25, 1941.

[fol. 467] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING

Entered June 25, 1941

Appellant's petition for rehearing is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *Mishawaka Rubber & Woolen Manufacturing Company* v. *S. S. Kresge Company*, No. 8612, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 19th day of August, A. D. 1941.

J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. (Seal.)

(Foregoing record printed pursuant to stipulation by and between the parties.)

[fol. 468] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, limited to the first and second questions presented in the petition for certiorari.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.